Alternative Dispute Resolution:
The Democratization of Law?

Heather S. McHugh

November 1996

Document Number: (PN-ACA-080)

Research & Reference Services
United Sates Agency for International Development
Center for Development Information and Evaluation
Room 203, SA-18
Washington, D.C. 20523-1820

The views presented herein are those of the author and should not be interpreted as reflecting those of the U.S. Agency for International Development or the Academy for Educational Development.

Contents

Overview

This paper is, in part, intended to serve as a companion piece to the recent report on rule of law (ROL)[1] published by the Agency for International Development's Center for Development Information and Evaluation (CDIE). The ROL paper noted that alternative dispute resolution (ADR) is fast becoming a seemingly viable and important element of major USAID efforts to reform the legal systems of developing countries. However, project designers and implementers, as well as the CDIE authors, are aware that USAID's knowledge of ADR methodologies, experience, and problems is limited. To that purpose, this paper will focus primarily on issues, problems, and cautions USAID staff should keep in mind when instituting ADR programs and not on whether ADR should be a viable element of USAID's ROL programming. Furthermore, **this paper will focus on "formal" ADR programs (formal in the sense of being linked in some way to the legal system). ADR programs and activities at the community level that are not linked to the formal judicial system, as well as traditional forms of dispute resolution, will not be included in this short paper.**

This paper is also intended as a desk-study of key secondary sources on ADR—including material located on the Internet, law review articles, articles from academic journals, newspaper stories, materials from dispute resolution organizations, and correspondence with ADR professionals—and attempts to summarize the main issues uncovered during the review into a tentative conceptual framework relevant to development experience. While the data available are not rigorous enough to come to definitive conclusions on ADR, they can be used to begin to develop a framework, explore some possibilities, discern gaps in the knowledge, and iterate some trends. These findings are intended to assist development professionals as they contemplate ADR programming. In particular, the available data and literature reviewed on the practical side of ADR do not support broad comparisons between countries. Indeed, development professionals should keep in mind that "comparative data is equivocal" (Crohn, 1996).

Certain caveats should be kept in mind as this paper is read. Though most of the literature reviewed focuses on the ADR experience of the U.S. and other "industrialized" countries, this literature was examined for its relevance to programming in USAID-presence countries. Wherever possible, developing country experience with ADR is integrated into this paper. As an added caution, readers should keep in mind that because most of the literature reviewed on ADR originates from legal articles and law journals—written by lawyers and judges—the literature might have an inherent bias against ADR. Moreover, ADR as a legal mechanism has "matured" to the point that initial and perhaps overenthusiastic endorsement of ADR has begun to be tempered by information that ADR may not always live up to expectations; although ADR has not matured enough to be definitive about its capabilities. Finally, another obstacle to analysis of ADR is that the "absence of records and written opinions makes the pathology of ADR difficult" (Brunet, Np). Thus, most of the literature reviewed on ADR has been focused on theoretical

[1] Blair and Hansen's "Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs" was published by USAID's Center for Development Information and Evaluation in February of 1994.

debates about the merits and utility of ADR and is only beginning to focus on the impact and measurement of ADR processes.[2]

This paper is divided into the following sections: introduction; strategies; types of disputes; sequencing issues; development objectives; and conclusion. Annexes include a table summarizing USAID experience with ADR, proposals of preliminary lessons learned, a list of USAID ADR contractors and other contacts, and more.

[2] Other reviewers of the literature on ADR have encountered similar problems when researching ADR. For example, Benjamin and Irving found that their review of ADR literature on family mediation was limited to works published in North America in English, thus leaving out "studies printed locally, produced as doctoral dissertations, presented as conferences [*sic*.] papers, published in Europe or elsewhere, or printed in smaller journals of limited distribution" (Benjamin and Irving 1995, 54). In addition, Benjamin and Irving note that comparisons between ADR experience in different countries (or even within the same country), between types of ADR, and even between types of disputes makes generalizations difficult—but not impossible (ibid.). Rather, they argue that generalizations should only cautiously be applied to local practice (ibid.). Indeed, these ADR experts suggest that such extraordinary variance in ADR is indicative of the robustness of ADR practices (ibid., 69).

I. Introduction

The following sections attempt to lay the substructure for the rest of this discussion on ADR. First, a definition of ADR is proposed, and then various ADR terms of art are identified. Then, the history of ADR in the U.S. is summarized.

Definition of Terms:

A review of the literature suggests that the term "ADR" draws from so many sources and uses that it is often confusing. Indeed, the terms "conflict resolution," "dispute resolution," and "ADR" are sometimes used interchangeably and sometimes are used quite differently by businesses, communities, the legal profession, development professionals, sociologists, and others. "Applying the term ADR [has come to] mean so many different things it is likely to become meaningless" (Hensler 1995, 1594). Therefore, because it most nearly coincides with the usage for USAID, a modified version of Hensler's definition of ADR will be used for this paper:

> ADR are procedures to resolve disputes that, compared with the traditional litigation processes of adversarial negotiation, settlement, and trial, enhance disputants' participation in outcomes and/or processes (ibid.).

The focus of ADR is on the actual parties to the dispute and not their legal representatives. And the "alternative" in ADR usually indicates an alternative to going to court (Council of Better Business Bureaus 1995, 1). Thus, with ADR the disputants believe that "negotiated ... solutions benefit each party more than the best possible outcome of litigation"[3] (Hill 1995, 2).

The following list is a consolidation of various terms of art that appeared during the research for this paper. All of them are interconnected and should be assessed in relation to each other (Kheel 1995, 2).

Typical ADR mechanisms:

> Negotiation: Negotiation usually takes place prior to the involvement of a mediator or arbitrator or judge, and before any money is spent; it allows the parties to talk and listen directly to each other; and it usually precedes any other type of dispute resolution (Kubey 1991, 42). Some experts believe that negotiation is a dispute resolution mechanism that is "largely based on power" (Hill 1995a, 3), probably because the absence of a third party means that the solution may be based on which party is the strongest.

[3] Litigation is the act or practice of carrying on a legal contest by judicial process.

Conciliation: Usually applied to civil disputes, conciliation is often a process of "first resort" in resolving conflicts. Conciliation requires a third party who deals with each of the disputants separately (Kubey 1991, 28). "It is voluntary and informal, and places emphasis on establishing mutual understanding of the interests and concerns that prompted the dispute. Often, this is sufficient for [dispute] resolution" (Delmer 1995, np).

Mediation: Mediation is a very popular ADR methodology, particularly in the U.S. and in Asia (Hill 1995, 3), because it is informal, quick, convenient, and can be confidential (Thierman 1995, 1). In this process, the parties to the dispute find out if their interests can be "broadened so that a true common ground can be found" (Hill 1995a, 3). Usually, a neutral mediator—who avoids expressing an opinion on the merits of the dispute and whose role is basically advisory (AAA Nd, 1)—is selected to assist "the parties in identifying issues, establishing areas of agreement, and in finding a solution or settlement of the dispute" (Thierman, ibid.).

Arbitration: Likewise, with arbitration the parties to the dispute select a third party or panel to listen to both sides and render a decision—which can either be binding or non-binding, depending on the parties' desires (Thierman, 2). Thus, if "neither of the parties vetoes the decision, it is recorded as a court judgment and the winning party can call on the court's authority to enforce it" (Hensler 1990, 402). With arbitration, it is rare that the decision is reviewed by the courts (AAA Nd, 1). The difference between mediation and arbitration is that arbitration usually employs methods that are based on rights (Hill 1995a, 3).

"Med-Arb": This is the combination of mediation and arbitration and is one of the newer types of ADR. With Med-Arb, mediation processes are usually tried first, and if they do not work, then arbitration is undertaken (Kubey 1991, 29).

Neighborhood Panels: These panels are groups of volunteers who provide mediation and, in some cases, conciliation, for disputes in their communities (Kubey 1991, 35).

Private Dispute Resolution: Private dispute resolution refers to dispute resolution procedures conducted by a third party on a for-profit basis that the disputants have entered into voluntarily and are paying for themselves (Roehl 1993, 131). Private dispute resolution often occurs outside the formal court system, without monitoring or authorization from the courts (ibid.).

Early Neutral Evaluation: With early neutral evaluation, a third party is hired by the disputants to give an evaluation of the case to help settle it. The disputant(s) and their attorney(s) are permitted to prepare written statements, present critical witnesses, or other evidence, argue the case with the evaluator, meet separately and confidentially with the evaluator, and utilize the evaluator to communicate any settlement offers to the opposing party (Hensler 1990, 400). "Failing settlement, the neutral evaluator helps the parties

identify areas of agreement, assess the strengths and weaknesses of their cases, and devise a plan for sharing important information and eliminating unnecessary discovery[4]" (ibid.).

Voluntary Settlement Conference: Similar to early neutral evaluation, during a voluntary settlement conference the parties employ a neutral settlement officer who attempts to persuade the parties to accept a compromise position. "It is a form of facilitated negotiation in which the settlement officer may express an opinion about the value of the case and the substantive merits of each party's position and the probable outcome of the trial." (ibid.).

Summary Jury Trials: "This method is an abbreviated trial. The parties employ a disinterested third party to serve as the judge and hire at least six people representative of the community to serve as jurors. The neutral third party then presides over the short presentation of each party's case to the jury. The parties may either agree to be bound by the jury's decision or utilize it in facilitating settlement negotiations." (ibid.).

Minitrials: Minitrials are the signature procedural mechanism of corporate ADR, which allows corporate executives to hear and assess the strength of their own, and their opponents', positions directly, rather than through their lawyers; they also help corporate executives identify business (rather than legal) solutions to their disputes, which may save not only litigation costs and time, but also allow the continuation of important business relationships (Hensler 1995, 1590).

A Brief History of ADR in the United States:

Because the United States has been "one of the major nations to develop collaborative decision-making and dispute resolution technologies," (Wildau, et al. 1993, 304) a brief overview of the history of ADR in the U.S. seems relevant. It is difficult to pinpoint precisely the origins of the ADR movement in the U.S. (Hensler 1995, 1589), because there are components and analogies to ADR found in early American history. As early as 1904, the Maryland legislature recognized that mediation and other forms of ADR "were beneficial to parties involved in labor disputes" (Klintworth 1995, 1). In 1947, collective bargaining dispute mediation was institutionalized within the Federal Mediation and Conciliation Service as a reaction to a record number of strikes at the close of World War II (Wells and Liebman 1996, 120-121). This effort was focused on preventing and minimizing "interruptions of the free flow of commerce growing out of labor disputes" (ibid., 121). Long experience with collective bargaining has provided much of the foundation for the ADR movement today.

Experts believe that the modern ADR movement began in the late 1960s as a social

[4] Discovery means the disclosure, during trial or in pretrial procedures, of oral and written evidence.

movement that attempted to "return the dispute resolution process to disputants" (Hensler 1990, 402). Mechanisms employed—including neighborhood justice centers such as those pioneered in San Francisco and Los Angeles, California, and Dorchester, Massachusetts—attempted to take disputes out of the court system altogether (ibid.). ADR proponents believed that these "alternative" processes would broaden **access** to justice and help disputants negotiate their own solutions to problems that would be more appropriate to their situations (ibid.). Some proponents of ADR believed that ADR would shift the focus of political control away from legal elites and help **empower** the poor and local communities at large (ibid.). Other experts trace ADR's beginnings to a Ford Foundation–sponsored project on conflict resolution launched in the late 1970s to find new ways of resolving complex public policy and official welfare disputes outside the formal system (Hensler 1995, 1589).

In the 1970s, ADR became a legal movement and the focus shifted to the courts themselves (Hensler 1990, 402; Hensler 1995, 1589). Leading this movement, the Speedy Trial Act of 1974 was enacted in response to widespread public concern regarding burgeoning criminal caseloads and consequent delay in cases coming to trial (Bridges 1982, 50-51). Thus, between 1978 and 1984, legislation was enacted to increase the number of federal district judges, and courts began to experiment with a "variety of dispute resolution procedures not expressly authorized by the Federal Rules of Civil Procedure" (Dayton 1991, 890, 891). Many legal experts believe that court-connected ADR originated with the 1976 Pound Conference address by Professor Frank Sander. In an analysis of disputes and dispute resolution, Sander urged courts to offer disputants a variety of dispute resolution procedures from which they could select the procedure that best fit their circumstances. (Hensler 1995, ibid.; Singer 1990, 165). Also in 1976, Chief Justice Warren Burger began to call for "increased emphasis on alternative methods for resolving disputes and admonished the bar to 'use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools to resolve disputes formerly resolved exclusively in the courts" (Berger as quoted in McMillan and Siegel 1985, 432). Thus, instead of concentrating on removing disputes from the courts altogether, ADR proponents sought to divert cases from trial in order to improve management efficiency—by **increasing speed of trial** proceedings and **decreasing transaction costs** (Hensler 1990, ibid.). Unlike the social movement proponents, court reformers did not seek to change either the outcomes of disputes or the core rules underlying dispute resolution nor to substitute lay decisions for professional legal decisions (ibid.).

ADR as a corporate movement began recently as some industries established arbitration-specific systems to deal with consumer disputes (Kubey 1991, 15). Among these industries are stockbrokers, manufacturers, moving companies, insurance companies, automobile firms, funeral homes, and some furniture makers. The advantage of such arbitration to industry can be: (1) to **decrease costs** of awards to consumers, since settling out of court is usually cheaper than jury awards, and the costs associated with ADR are cheaper than lengthy formal trials; (2) to **increase predictability of process**, through increased control of when the ADR process will occur; and (3) to **increase the predictability of outcome**, by increasing chances that a judge or mediator who understands the technical background to the complaint will be selected. However, some

legal experts contend that any ADR "system run by or for industry is suspect" because the system is biased against the disadvantaged, and it is unable to deal with possible violations of law (Kubey 1991, 15).

This brief analysis of the history of ADR in the U.S. is relevant to the evolution of ADR in developing countries because it highlights many of the assumptions of U.S.-based legal experts as they design, implement, and/or evaluate ADR projects. Thus, the section above shows that ADR mechanisms have been implemented in the U.S. to: broaden access to justice; empower the poor and local communities; increase speed of proceedings; decrease costs; and increase predictability of process and of outcome. Further research in developing countries would probably result in finding similar assumptions but may indeed identify radically different assumptions for implementing ADR mechanisms. This, unfortunately, is beyond the scope of this paper as the author was unable to identify any comprehensive history of ADR outside of the United States.

II. Two ADR Strategies

Legal experts, political scientists, and development specialists continue to debate the appropriateness of where to place ADR **in relationship to the formal legal system**—either within or outside—even as development experts build ADR components into their legal programs. The following briefly examines issues to be considered when strategizing on how to employ ADR processes.

When ADR is Part of the Formal Legal System:

ADR mechanisms can be built into the formal legal system, usually with some degree of supervision and control by the legal system. Indeed, "court-annexed" or "court-ordered" ADR is often promoted by judges, lawyers, or other public officials as an effort to reform the formal litigation process (McMillan and Siegel 1985, 433). Examples of court-annexed ADR include: the mini-trial, neutral-expert fact finding, arbitration, mediation, and negotiation, all of which take into account those arguments based strictly on the law (Kubey 1991: 1).

The popularity of court-annexed ADR structures is due, in part, to the idea that it can be a one-stop-shop for justice as courts become the "department stores of disputing" (Brunet 1987, Np). Not surprisingly, court-annexed ADR mechanisms are usually closely supervised and even mediated by judges, lawyers, and other legal professionals. Because of the informal and flexible nature of ADR, some experts have expressed serious doubts about the advisability of providing a home for ADR in the court environment with its emphasis on strict formality and adjudication (Mowatt 1992, 51). However, court-annexed ADR can provide the more formal court system with "laboratory-tested" options; that is, certain ADR mechanisms can influence the development of the formal legal system.

If ADR is placed within the formal legal system with strict control over ADR procedures, similar reporting and discovery requirements, formal justice system oversight and review of ADR findings, and more, then what are the benefits of ADR? Is it a real alternative to the legal system? If ADR mechanisms are too similar to the formal legal system's mechanisms, will the demand and subsequent use of ADR decline and eventually lose its "distinctive edge" as an alternative dispute resolution process?

When ADR is Separate from the Formal Legal System:

More commonly, ADR mechanisms and processes are established outside of the formal legal system with varying degrees of independence from the legal system. These "privately funded ADR" structures are usually a response to the notion that the lawyers, judges, and other legal entities are part of the problem of a costly, corrupt, or otherwise incapacitated formal legal system—or simply that the formal court system is unavailable to the average person. Examples of these types of ADR can include private sector ADR (both for profit and not-for-profit ADR), local government structures (such as neighborhood dispute-settlement schemes), labor arbitration, commercial arbitration (including international investment arbitration), traditional mediation, conciliation, and more. When ADR is separate from the formal legal system, arguments can be based on the law, as well as on concepts of fairness, morality, or traditional practice (Kubey 1991, 11).

In reality, however, the line distinguishing court-annexed ADR systems from privately funded systems is often unclear. Both types of ADR seem to result in speedy dispute determinations with enough participant involvement to promote adherence and loyalty among the disputants for ADR processes (Brunet 1987, Np). In many cases, both types of ADR have legislation that requires ADR settlements to be reported to the courts. In theory, however, privately funded ADR is set up as an **alternative** to the formal legal system, not as a supplement.

If, as some experts assert, the demand for court-annexed ADR comes from judges and other legal professionals rather than the public (Brunet 1987, Np), it is assumed by many that the demand for privately funded ADR comes from the public. This "public" could be the business community, neighborhood communities, and others, but often does not include marginalized groups for reasons that will be discussed later.

Separation Versus Inclusion:

What is the answer then? Should ADR mechanisms and procedures exist within or outside the formal legal structure, or both simultaneously? Experts remain divided as they argue over the distinctions between substance and procedure, rights and norms, co-option versus too much independence. Most experts do agree that there are some disputes where substantive norm enforcement and guidance may not be essential—in other words, that there are some disputes

where ADR is relevant and worthwhile. In response, it has been suggested that some administrative screening or substantive review of a dispute is necessary prior to a decision in order to assess the case's substantive importance; and that a brief post-decision judicial scrutiny or approval of an ADR result and process is likewise essential (Brunet 1987).

The experience with ADR in India is interesting. As the popularity of the "People's Courts" increased, the legal system pushed to have them vested with statutory authority (e.g., the ability to summon witnesses and documents) at the risk of losing the informality, flexibility, and voluntary nature of processes (Whitson 1992, 412). With the statutory authority some analysts believe that the ADR process was coopted into the formal legal system, which might explain why the number of cases decided by the People's Courts declined drastically—and eventually ceased to operate. However, another interpretation of what may have occurred is that the innovative processes introduced by ADR were gradually adopted by the formal legal system, and cases decided by the formal courts—but using ADR processes—may have increased as a result!

III. Types of Disputes

The issue of what types of cases are appropriate, or not, for ADR was often addressed in the literature reviewed for this paper. Most experts agree that there are many kinds of disputes which are **not** appropriate for ADR process but often disagree and contradict each other on what types of disputes are appropriate (Houseman 1993, 11; Spain 1994, 7; Edwards 1986, 14). Perhaps the most controversial types examined in the literature reviewed are family disputes. For example, some experts believe that ADR may be most relevant to family disputes, particularly those involving minor children, because the resolution will have to deal with continued relationships of parties involved (Spain 1994, 9; Development Associates 1993, 29-30). Other experts, on the other hand, believe that ADR will lead to "second-class justice" if family law is included: All rights for women could become a mirage if all family law disputes are blindly pushed into mediation (e.g., battered women often need to be protected from the batterer, not reconciled with the batterer) (Edwards 1986, 14).[5]

This suggests that criteria should be developed to clearly delineate the circumstances under which ADR may be appropriate, depending on the development context (Spain 1994, 7). Such criteria should be based on whether laws, such as divorce and other family laws, are well established and accepted or whether such laws are contradicted by norms of behavior (for example, if the norm is to reconcile in cases of wife abuse). Indeed, most experts believe that ADR is most relevant when laws approximate norms, and that ADR is not as appropriate when there are significant discrepancies between norms and laws (Edwards 1986, 15). Development

[5] For an extensive review of mostly U.S.-based research on family mediation, see Benjamin and Irving's review of fifty-one studies of process, outcomes, and predictors that lead the authors to conclude that "family mediation is an effective and efficient service technology that, at its best, can be more helpful than litigation in assisting divorcing couples in conflict" (Benjamin and Irving 1995).

experience seems to indicate that this tension (between norms and laws) is often found when "community norms" are not consistent with national laws—especially when there are highly traditional communities that are not linked to the central government (ibid.). This issue, however, is hotly debated within the literature reviewed on ADR. For example, other experts contend that ADR mechanisms can be used to establish new norms or laws, or that they can be used to negotiate the terms of new laws or regulations (Moore 1996, 2).

Brock suggests a useful way to categorize ADR by types of disputes: site-specific dispute resolution, which uses mediation, negotiation, or arbitration to resolve particular types of disputes (e.g.,traffic cases) or institutionalized ADR, which refers to dispute resolution systems "that can be applied to various unrelated disputes" through processes focused on public policy (Brock 1991, 58). In essence, site-specific ADR arises in areas where "recurring" disputes come under the purview of the same legal body, political jurisdiction, administrative agency, or policy area (ibid.). On the other hand, institutionalized ADR requires pre-conditions and rules governing all the possible disputes that could arise (French 1993, 403). This makes institutionalized ADR less flexible (ibid.) thus making ADR "a less attractive way to encourage the use of mediation and negotiation" (Brock, 60; French, 403). Again, this suggests that development experts should be cautious about pursuing institutionalized ADR mechanisms in areas where new norms or laws are required—where public laws are not the norm.

Findings:

- In one community-based program in *Argentina*, ADR cases deal with family law (marriage and divorce), legislation on automobile and property titles, cooperative property or condominiums, neighborhoods, and real estate rent disputes—all of which make up 50 percent of the total ADR case load (NCSC 1994, 58).

- An evaluation of a USAID-funded ADR program in the *Philippines* found that ADR is appropriate for disputes over interpersonal relations, neighborhood quarrels, collection cases based on creditor-debtor relationships, claims for damages, consumer disputes, landlord-tenant relationships, minor criminal disputes, domestic relations (including marriage and child support or custody), and settlement of estate (Development Associates 1993, 29-30).

- In *India*, motor vehicle accident claims and family disputes were the most prevalent cases in the ADR-based People's Courts, proving popular with both claimants and insurance companies (Whitson 1992, 412). Indeed, the popularity of compensation disputes being settled through ADR processes created a demand for specialized ADR mechanisms—focused exclusively on motor vehicle compensation claims (ibid., 413).

- In *El Salvador*, ADR programs are designed to specifically respond to land title disputes (NCSC 1995, 1).

Potential Solution:

- Some administrative screening, or substantive review, of a dispute to assess the case's importance is essential in preventing ADR from taking on inappropriate types of cases (Brunet 1987, Np). However, it is not clear from the available literature where this review should take place (e.g., at a court hearing, at a neighborhood dispute center, by a paralegal, or elsewhere).

  In the *Philippines*, for example, a qualification system allows cases deemed more appropriate to the formal courts' jurisdiction to be referred to formal courts and not to ADR systems (USAID [1993], 38).

- The implementation of a dispute resolution system can include a requirement that a decision be made by the disputants early in the process as to which standards will guide decision-making (e.g., national laws or local norms) (Moore 1996).

The conclusion, then, on the types of disputes relevant to ADR processes is that ADR mechanisms are clearly relevant when norms are defined by rule of law. The articulation of public law, where norms do not always parallel laws and important constitutional issues need to be decided, is more problematic for the relevance of ADR processes.

IV. Sequencing: ADR and Formal Legal Processes

An examination of the literature reviewed reveals an implicit theme of sequencing regarding ADR processes and formal legal system processes. Although not always obvious, there seem to be three major practices: one where ADR processes precede the formal legal mechanisms, the second where ADR processes coincide with formal legal mechanisms, and the third where ADR processes follow formal legal mechanisms, but only when the courts refer certain types of disputes to court-annexed programs. Typically, however, formal court decisions—including referrals to court-annexed ADR settlement programs—end the dispute process, suggesting that the buck really stops with formal litigation.

When ADR Processes Precede Formal Legal Mechanisms:

Commonly, legislation mandates that ADR processes precede formal litigation. Litigation is, therefore, considered to be the court of last resort. This suggests that when reduction of the formal legal system’s case load and reduction of settlement costs are the primary concerns of ADR programs, then sequencing of ADR before litigation may be a valid technique. This also

hints that ADR programs based on traditional dispute resolution methods, or community-level ADR programs, are more likely to emphasize sequencing.

Findings:

- In *Japan* ADR mechanisms are used as an alternative, or a preliminary, process to litigation (Reif 1990-1991, 628).

- In *China* conciliation is used to settle civil disputes. If successful, a settlement agreement is reached and then the case is closed. If conciliation is not successful, then the arbitration tribunal will initiate a hearing (Weisan 1989, 94-95).

- In *Colombia* all labor and most civil, traffic, administrative, and family disputes must go through the ADR process of conciliation before a case is initiated (USAID PDABD423, 19).

Defacto sequencing can exist when parties to a dispute appeal the ADR settlement by taking their case to the formal legal system. This can (or should) only occur if the ADR settlement decision is not binding.

Finding:

- In *Nepal* rich and persistent losers often appeal "valid" ADR settlement decisions to the formal system in an attempt to receive different—hopefully better—legal decisions (USAID PDABE875, 21).

When ADR Processes Parallel Formal Legal Mechanisms:

On the other hand, an examination of many ADR programs reveals that when ADR is set up concurrently to the formal legal mechanisms, then sequencing is not an issue. Except when mandated by law for specific types of cases (e.g., criminal cases), disputants can "shop" for the settlement process that they feel will be most beneficial to them. For example, disputants may feel that ADR processes are cheaper than the formal legal processes, and thus choose mediation or arbitration through ADR. Or the disputants may feel that financial settlements are higher when disputes are decided by formal courts, and thus choose mediation or arbitration through the formal courts. Thus, when ADR and formal legal processes are offered at the same time, the two dispute resolution systems can compete for the same disputants by offering different processes and probably produce similar products.

Finding:

- At the village level in *India* a "bi-legal" system was employed where both indigenous and official laws were combined in accordance with the community's own calculations of propriety and advantage (Galanter 1972, 64).

However, if the systems compete for disputes, then it is possible for ADR decisions to be overturned by the state—if the state feels that the local dispute resolution mechanism was improperly used. This has the potential to cause instability within the legal system, as local solutions clash with national dispute resolution decisions.

When Formal Legal Mechanisms Precede ADR Processes:

When formal legal processes precede ADR, ADR and the formal legal system do not compete for the same disputants. Instead, the formal legal system takes full control over ADR processes. For example, disputes may be required to be presented to the formal courts, which then decide whether or not the dispute should be settled by the court or by an ADR process. ADR, therefore, is set up subordinate to the formal legal system. This is more likely to occur when ADR is incorporated into the formal legal system as court-annexed ADR; thus ADR does not begin until litigation has begun (Mowatt 1992, 54).

Findings:

- In *India* some lower district courts offered parties who have already filed formal suits, particularly in divorce cases, the option to transfer to an ADR process in order to attempt a conciliated settlement (Whitson 1992, 411).

- In *Bolivia* courts refer some of their caseload to court-annexed arbitration processes (USAID PDABI526, 23-24).

Thus, the conclusion on the sequencing of formal court processes and ADR process is inconclusive. This may be appropriate since "sequencing should generally be geared to the situation, the type of dispute, the parties, and their choices about [the appropriate] methods of dispute processing" (Moore 1996).

V. The Development Objectives for ADR:

In five of the six countries studied for the 1994 CDIE rule of law (ROL) paper, Hansen and Blair found that ADR mechanisms have been employed by a number of governments and donors in order to "bypass court systems that are frequently unresponsive to reforms" and to "make legal services more available and affordable to low-income people" (Blair/Hansen 1994, ix). Thus, their conclusion was that ADR seems to be most relevant to ROL strategies focusing on access creation and judicial reform. One very telling finding from the Blair/Hansen

assessment is that ADR is not usually considered to be a mechanism for strengthening the **existing** legal systems. It would appear, then, that ADR is usually considered—in the development context—to compete with the formal legal system.

A review of the Blair/Hansen paper and other academic literature, found seven major reasons for creating ADR mechanisms in developing countries: (1) to reduce the legal system's overburdened case load; (2) to be a more cost effective process than the formal legal system; (3) to increase the access of marginalized groups to the legal system; (4) to create non-corrupt and predictable fora for dispute resolution; (5) to provide a legal laboratory of judicial processes and concepts; (6) to expand the marketplace of judicial options; and (7) to improve satisfaction with and the quality of the dispute's solution. After these seven objectives were identified, each was analyzed, using available material and focusing wherever possible on developing country information.

1) ADR and reduction of the legal system's overburdened case load:

In many countries the legal system is overburdened with huge, unmanageable case loads which cause prolonged delays in judicial settlements. Whether this indicates that developing countries become more litigious as they industrialize and democratize, or that the system is indigenized at the operational level (Galanter 1972, 63), or whether this is a reflection of new and multiple tasks being allocated to courts (see Brunet 1987, 6), or whether the courts are simply poorly managed (Crohn 1996) is unclear. What is clear, however, is that many legal systems are often unable to deal with case loads in an efficient and timely manner. Thus, ADR mechanisms are often employed as a strategy to reduce the stress on the formal legal system by allowing certain cases to be referred to ADR processes.

Findings:

- In *India* parties spent on average 14.6 days before a court, and only 1.2 days, on average, for an ADR decision (Whitson 1992, 418).

- In the *U.S.* the average wait for trial is 18 months, while the average wait for an ADR decision is just three months (Edwards 1986, 7). The Federal Justice Center found that cases that are resolved by arbitration close from two to 18 months sooner than cases resolved by trial (Meierhoefer 1990, 10).

- On the other hand, a study of an arbitration program in *New Jersey* found that arbitration actually increased the average time to settlement by about one-third (as reported in Hensler 1990, 411).

- Another Federal Justice Center study of ADR in the *U.S.* found that 97 percent of judges reported court caseload reductions as a result of voluntary arbitration

programs (Rauma and Krafka 1994, 12).

- In the *Philippines* the average speed in deciding cases by voluntary labor arbitrators is only 25 days—with a low of 5.14 days for the shortest, and a high of only 51.75 days for the longest—compared to an average of three years for the disposition of cases through other channels (AAFLI Nd., 4).

- In *Argentina* a one-year pilot program focused on court-annexed ADR resulted in a 72 percent settlement rate, and doubled the involvement of judges in the program (NCSC 1995, 1).

Can the implementation of ADR programs actually decrease the burden on legal systems? The evidence seems to support the concept that ADR can reduce the time needed to reach a decision, depending on whether the courts adopt special procedures to identify and expedite arbitration-eligible cases (Hensler 1990, 410). For example, some courts require plaintiffs' attorneys to certify whether cases are eligible for arbitration at the time that the complaint is filed (ibid.). A potential lesson learned from New Jersey indicates that, in the short term, ADR may actually increase the time needed before a decision is reached, while the parties and legal representatives involved become more familiar with the ADR processes.

One concern about determining whether ADR processes have been successful has been expressed over the use of settlement percentages and numbers of cases settled (see Sander 1995, 329-331). Sander suggests that settlement percentages as an indicator—even if refined in such a way as to take into consideration timing of evaluation (disputants may judge the process to be a success immediately after the settlement, but many months later may feel differently), differences in types of cases settled, quality of the resolution, types of ADR mechanisms, and comparisons to other dispute resolution mechanisms—are just one aspect of mediation or arbitration success (ibid.). "The fact that [success is] ... often difficult to measure explains, but does not justify, the resort to crude settlement percentages" (ibid., 331).

Some legal experts contend that the number of disputes may actually **increase** with the availability of an ADR program, because the costs of dispute resolution are reduced (Terrell 1987, 11). So, rather than diverting cases away from the overburdened formal legal system, ADR may actually add to the overall numbers of disputants seeking settlements. Other experts contend that since many disputants would have settled their cases without arbitration, mediation, or trial, the actual numbers of cases settled by ADR processes instead of by the formal system are inflated (Hensler 1990, 408). Thus, if the purpose of instituting an ADR program is to **reduce the number of disputes** entering the formal legal system, then it may be that ADR programs are not the most appropriate response. Indeed, Dayton finds that "there is no empirical evidence to support the proposition that using ADR as part of a delay reduction plan will better facilitate improvement in the condition of court dockets than more traditional methods with which courts and litigators are more familiar" (Dayton 1991, 951).

If, however, the purpose of ADR is to **increase access** to justice—which an increase in the numbers of cases could indicate is occurring—then it may be that ADR programs **are** an appropriate program response.

If there is some evidence that ADR programs may not reduce the total numbers of informal cases, what impact has ADR had on the numbers of formal cases? Indeed, none of the data referred to in the literature reviewed was able to show that either the number of cases before the formal legal system, or the wait for a formal court trial, actually decreased with the introduction of ADR mechanisms.[6] Indeed, if the backlog is due to poorly managed court systems, then there is no way that ADR mechanisms will be able to reduce the backlog (Crohn 1996). Furthermore, it is equally likely that poor court management will creep into the ADR system (ibid.). Some experts, however, continue to contend that when ADR is restricted to the application of clearly defined rules of law, where the articulation of public law is strictly confined to the courts, it can be an effective means of reducing mushrooming caseloads (Edwards 1986, 15).

2) ADR can be a more cost effective process than the formal legal system:

ADR is often promoted as an efficient and inexpensive alternative to formal legal processes. In many countries, high lawyers' fees, costs of discovery, and costs of delay can keep the poor and other marginalized groups out of the formal legal system.

Findings:

- In the *Philippines*, at two ADR sites funded by USAID, 30 percent of the mediation cases were successfully settled, while the balance of cases was returned to court. "This ... resulted in considerable savings in litigation expenses to the government and litigants" (Development Associates 1993, 30).

- Also in the *Philippines*, costs of ADR in the Katarungang Pambarangay are limited to the expense of training the mediators; afterwards, the services of the mediators are voluntary (USAID [1993], 37).

- A disputant's costs before an ADR court in *India* was around 38 rupees, versus

[6] Recent studies have shown that the caseload of the U.S. federal district courts has been increasing significantly: the total number of cases filed in the federal courts grew from 33,591 in 1938 to 217,879 in 1990; the total number of civil filings increased from 207 per judgeship in 1955 to 448 per judgeship in 1990 (even taking into account the type of case filed); the median length of time from issue to trial increased from 9.1 months in 1955 to 14 months in 1990 (Dayton 1991, 889). Even as legislation encourages ADR processes and mandates speeding up the wait for trial, these trends seem to indicate that the problem of overburdened courts is not adequately treated by ADR mechanisms introduced thus far in the US.

955 rupees spent in litigation. The state spent the very low amount of around 1.4 rupees per ADR case, versus an unknown number of rupees spent on litigation (Whitson 1992, 418).

- A 1992 survey of 291 *U.S.* corporations found that they saved an estimated $153 million in attorney fees and expert-witness costs by using ADR in cases where more than $5 billion was at stake[7] (Johnson 1993, 20).

- In the *U.S.* fees paid to ADR arbitrators can range from $65 to $150 per day (Barnes 1992, 691). On the other hand, Hensler reports rates of $25 to $30 per hour (Hensler 1990, 409); and Reuben and Johnson found that ADR mediator fees can range from $350 to $500 per hour[8] (Reuben 1994, 55; Johnson 1993, 20).

- Also in the *U.S.*, a disputant's discovery costs for evidence can cost up to $350 an hour for ADR cases, while the standard for cases tried in the formal legal system is $14 per motion[9] (Reuben 1994, 57).

- In *New Jersey* a study found that defense attorneys reported an average of 15 billable hours to settle cases, regardless of whether the case was assigned to ADR process or to formal court processes[10] (Hensler 1990, 414).

The data suggest that there can be hidden costs associated with ADR, thus driving up the actual costs of ADR mechanisms. In particular, the costs of hiring certain mediators or arbitrators, acquiring advocates or lawyers, costs of translation for ethnic groups, and costs of discovery may add directly and indirectly to the overall costs of ADR. This does not mean that ADR is never cheaper than formal court processes. Rather, the type of dispute and the context of its resolution may generate wild variations in the overall costs of dispute resolution. For example, if a high technology firm wants to use ADR mechanisms to resolve a dispute over corporate ownership of state-of-the-art human capital, it may be worthwhile for the firm to pay higher fees for specific patent attorneys, pay a higher fee for a specific type of judge/mediator, and pay a high fee for discovery. The technology firm still expects to get a better decision than through normal court channels, and it may still end up with a cheaper process than if it had used the formal courts. On the other hand, the social costs of formal legal systems—the costs of operating the courts, salaries for judges and other court staff, legal subsidies (e.g., discovery costs), and

---

[7] Similar information can be found in a footnote in Jacobs 1995, 113.

[8] These data have been questioned by some ADR experts, who suggest that the data are not representative of the field as a whole. Rather, these experts seem to be concerned that fees for arbitrators and mediators are contextual—the fee structure changes depending on the type of dispute settlement, the nature of the dispute, and the type of disputant. However, this information refutes the assumption that fees paid for ADR processes will always be lower than formal court mechanisms.

[9] The lower cost of discovery could be due, in large part, to the fact that the formal legal systems subsidize certain costs. Again, this data has been questioned by some ADR experts as not being representative of the field as a whole.

[10] Of course, attorneys are often not utilized for many ADR processes.

more—needs to be measured in order to more fairly compare them to ADR costs (Moore 1996). Thus, comparisons of ADR to formal court processes—and comparisons of one type of ADR process with another ADR process—may be spurious.

Finding:

- A recent study in the *U.S.* found that mediation was "far less expensive than arbitration"—median cost of mediation was $2,750 while median cost of arbitration was $11,800 (Brett, Barsness, Goldberg 1996, 263).

The point remains, however, that hidden costs of ADR may make some ADR processes more costly than the disputants expect. If the direct and indirect costs of ADR are not always cheaper than costs associated with the formal legal system, are there strategies that development professionals can attempt in order to reduce the costs of justice for the disputant?

Potential solutions:

- One obvious answer is to **subsidize justice**—whether through ADR mechanisms or through traditional formal legal systems—for the poor and other marginalized groups (see Houseman 1993, 9). It seems that development professionals should keep in mind that dispute resolution, no matter whether it takes place in formal courts or ADR settings, is a "labor intensive [and therefore expensive and time consuming] service industry" (Brunet 1987).

  In the *Philippines* arbitration fees are set at rates substantially less than what can be spent in court litigation (USAID [1993], 37).

  Also in the *Philippines*, the legislature passed an act that allows financially burdened parties in voluntary arbitration—particularly labor unions—to have access to a subsidy (AAFLI Nd., 3).

- Other potential solutions to reduce costs to disputants include holding hearings relatively early on in the litigation process or limiting pre-hearing discovery activities or requiring that discovery be completed before the hearing—evidence from *North Carolina* and *Hawaii* suggest that this can reduce disputants' costs by about 20 percent (Hensler 1990, 414).

In addition, initially costs of private ADR services may increase as the number of organizations—both nonprofit and for profit—compete with each other for market share. For example, many observers of U.S.-based ADR note that ADR organizations must attempt to develop a market for their services, some by developing relationships with particular industries (as the U.S.-based Council of Better Business Bureaus has with some automobile manufacturers),

and others by offering exclusive relationships with their mediators (as JAMS does with its cadre of retired judges) (Coulson 1992, 40; see also Singer 1990, 167). Indeed, the California-based private arbitration giant, Judicial Arbitration & Mediation Service Inc. (JAMS), estimated that it handled 1,200 cases a month and earned more than $30 million in revenues in 1993 (Reuben 1994, 55). Private ADR has become a big business enterprise in the U.S., and has overwhelmed the community and neighborhood grassroots ADR movement. On the other hand, over time competition among providers and a range of types of services may help to bring down the costs of ADR (Moore 1996).

In conclusion, it seems that the vast cost savings experts expected from investments in ADR processes have not been realized—whether the savings are passed on to the disputant or to the legal system. Evidence does suggest, however, that there may be some small savings for the government that result from the diversion of cases away from subsidized legal venues to privately funded fora. Moreover, costs may have more to do with the types of cases (e.g., big business disputes versus community level disputes) than with the system chosen (Crohn 1996). Therefore, cost savings, as a rationale for investing in ADR, is an uncertain objective. When investing in ADR mechanisms, development experts should keep in mind that the goal of cutting costs by encouraging the poor to access ADR mechanisms is often pursued without regard for whether ADR is an appropriate or effective process (Edwards 1986, 2).

3) ADR can increase access of marginalized groups to the legal system:

Theoretically, one of the main aims of ADR is to increase the access of the poor and other marginalized groups to the legal system. This is perhaps the most difficult rationale to prove. The current academic discussion on access centers on two major issues: the access of the poor, and the access of disputants with unequal power.

Quantifiable evidence on whether the poor have been using ADR mechanisms is, thus far, generally lacking—particularly from developing countries. However, most experts contend that ADR has the **potential** of increasing access to justice for the poor by providing additional fora for the resolution of disputes (Spain 1994, 5).

Findings:

- In the *U.S.* 80 percent of the legal problems of the poor go unaddressed by the formal legal system (Spain 1994, 2). Although Spain also found that the poor who do seek judicial settlement tend to rely on the courts or administrative hearings rather than on ADR procedures (Spain 1994, 4).

- On the other hand, in the *Philippines* a dispute resolution program focused on agrarian reform found that "if the mediator can isolate sources of power, mediation can be a good tool for increasing access to the legal system by

marginalized groups" (Magno 1996).

- Likewise, Hensler reports that litigants in the *U.S.* with small value cases and modest resources have found ADR procedures their only practical opportunity for justice (Hensler 1995, 1593).

- For example, community based programs have helped demonstrate that ADR can increase access to justice and do so in an inexpensive manner (From NCSC 1995, 2).

- Moreover, evidence from the field suggests that ADR programs are more likely to be successful in areas of the country where the formal justice system is inaccessible to the majority of citizens (Whitson, 434; NCSC 1995, 2).

There are three main hypotheses explaining why the poor seem to be ignoring ADR mechanisms. One suggests that the poor are concerned with the hidden costs of many ADR processes and are more likely to take disputes to the legal system where costs are subsidized. Other theories postulate that the poor believe that their rights will be better protected in formal court structures (Spain 1994; Edwards 1986, 30). And last, some experts suggest that the disputes in which the poor are more likely to become embroiled usually end up in formal courts because their issues are typically centered on fulfilling legal obligations or on protecting their civil rights (Spain 1994; Edwards 1986, 31). The answer probably lies somewhere among these different hypotheses. The result is, according to many experts, that expanding the use of alternatives to the justice system may leave the poor with public courts and the rich with a variety of alternative fora that provide more effective and efficient resolution of disputes (Houseman 1993, 9; Whitson 1992, 440, 444).

Finding:

- In *India*, "the entire conciliation effort has been directed through the state legal aid programs. It has aimed entirely at urging the poor, who are mainly women, members of scheduled castes and tribes, and small land owners, and [those] who are most in need of the protection their legal rights offer them, to compromise their rights" by using ADR mechanisms instead of the formal court system (Whitson 1992, 440).

Whitson's argument assumes that the parties to the dispute are of different castes, or of **unequal power**, which indicates that ADR mechanisms have the tendency to emphasize the will of the dominant disputant over the will of the marginalized disputant (Ippolito 1990, 342). This domination over the settlement by the more powerful could well lead to business or state institutions using ADR to shift the balance of power in their favor, which they might have been unable to achieve through normal legal processes where disputants are supposed to be equal in the eyes of the law (Mowatt 1992, 55). Indeed, one expert states that ADR decisions "may merely

legitimate decisions made by the existing power structure [or elites] within society" (Edwards 1986, 13). Other experts go so far as to warn that ADR can sometimes "help the rich steal from the poor" (Kubey 1991, 6).

Findings:

- Divorcing couples with equal (self-reported) financial knowledge reached fuller agreements than those with unequal financial knowledge (Ippolito 1990, 342).

- Some indication exists that when the costs of negotiation for each side are unequal there will be fewer settlements reached (ibid.).

Potential solutions:

- **Avoid mediation and rely on a non-consensual means of conflict mediation** (e.g., a judge). As an alternative to ADR, the litigation process, with its strict procedural requirements, does to some extent balance the relative strengths of the prospective litigants (Mowatt 1992, 55).

- Arrange for the weaker party to **have a legal advocate during the mediation process** (Ippolito 1990, 342).

- The **mediator could intervene to balance the power discrepancy**, although experience shows that this has not always been very successful (ibid.).

- Effective access to ADR fora by the poor may require both **public subsidies** and **effective outreach** (including education programs) by ADR providers (Houseman 1993, 10; Spain 1994, 8).

- A **"multi-partite" participatory approach to the development and implementation of ADR** mechanisms, beginning at the grassroots levels and including the people who will actually be the users of these mechanisms, can help realize the full potential of ADR mechanisms (Kamberis 1996). This approach can "raise the consciousness of larger sectors of society to such issues as equity, access to justice, and rule of law ... [and] can also help to balance the effort of elites to dominate the process and mechanisms" of ADR (ibid.).

If the rationale for investing in ADR focuses on increasing the access to the legal system by marginalized groups, then development professionals should be aware that results may be meager. Unless the access to ADR processes is subsidized, it seems that the best "kind of legal aid for the poor [may be] through direct legal services of a lawyer" (Whitson 1992, 442). Likewise, ADR programs should be particularly sensitized to the issue of disputants with unequal power. In conclusion, until and unless evidence from developing countries can show that the

poor and marginalized groups are really utilizing ADR mechanisms without being taken advantage of by stronger disputants, then this development assumption should be cautiously advanced.

4) ADR can be an alternative to corrupt and unpredictable formal courts:

An underlying rationale for including an ADR component in many ROL programs is a concern with corrupt legal systems. Entrenched rent-seeking judges, usurious legal fees, capricious judgments, insidious systems ... all may be practices that seem impervious to reform efforts. ADR seems to offer an attractive, prompt, and easy alternative to corrupt formal legal systems.

- In *Argentina* corruption issues have seriously weakened public trust in the justice system. A recent Gallup poll found that 66 percent of the public believed that judges were corrupt (as reported in Blair, et al. 1994, 6).

- In the *Philippines* affluent Filipinos virtually never go to prison (Golub 1994, 7). Indeed, corruption is so rampant in the legal system that some judges are called "hoodlums in robes" (as quoted in Golub 1994, 9).

Currently, however, there is no evidence to suggest that ADR is either more or less corrupt than formal legal systems. Indeed, this type of data is particularly difficult to quantify. Some experts have suggested that ADR systems may eventually face the same corruption issues and pressures as the formal legal system. Rather than assume that a new system will automatically be inherently honest, donors could consider addressing corruption issues directly—either by attempting the difficult process of reforming the old corrupt legal system and/or by supporting ADR mechanisms publicly focused on anti-corruption activities.

Potential solution:

- The Makati Business Club in the *Philippines* has developed the concept of a Philippines "**Court Watch**" conducted by law students. These law students randomly attend civil and criminal trials, fill out questionnaires on the proceedings, and provide data to the Asia Institute of Management for eventual academic research. The findings are reported in the press and serve to deter

  corruption since judges and lawyers never know when they are being watched. Any charges of corruption are brought to the Supreme Court.

On the issue of predictability, it would seem that the formal legal system can be more predictable than an ADR system. ADR mechanisms may be less predictable than the formal legal system because many ADR processes and settlements are confidential, and ADR processes often

have scant public accountability (Reuban 1994, 54). Thus, unless ADR mechanisms are tied to a particular industry and/or type of dispute, knowledge about past decisions/agreements may be rare. Indeed, some feel that "ADR has developed into a private system of justice in which those who can afford the price can hire their own judge and have their dispute resolved in an atmosphere far removed from the filth, hurly-burly, and uncertainty of the court system" (MLW 1992, 10). On the other hand, ADR mechanisms may seem more predictable for some disputants because the mediator, or neutral third party, can be mutually chosen by the disputants and because ADR has the potential to exist outside of the influence of political concerns.

Potential solutions:

- USAID has some experience in supporting anti-corruption projects by focusing on the issue of **transparency within the legal system**. This type of project can promote the monitoring of judicial procedure and can allow the literate public access to information on decisions. USAID has supported the establishment of such "judicial information systems" in *Colombia* and *Guatemala*, which publish transcripts of proceedings and final decisions.

- Written opinions and records of settlements make the results of ADR much easier to substantiate. In *India* law clerks and officers from the formal legal system **reviewed and recorded** all ADR settlements (Whitson 1992, 421).

  A potential problem of such a reporting system is that it may cause a critical overburdening of staff. In the Indian example, eventually the clerks refused to handle the ADR cases, and the government refused to provide funding for additional ADR staff.

- **Panels of mediators or arbitrators** freely selected by the parties, may be used to prevent corruption—because it is more difficult to bribe a group selected by the parties than an individual (Moore 1996).

- Brief judicial scrutiny or approval of an ADR settlement and process can be crucial in preventing ADR from straying too far from substantive norm enforcement (Brunet 1987, Np).

To sum up, this review revealed no evidence to support the belief that ADR processes are less corrupt than the formal legal system, nor was evidence found that the popularity of honest ADR mechanisms will influence the reform of corrupt formal legal systems. However, because of the sensitive nature of donor programs focusing on corruption issues in developing countries, this lack of evidence could be due to vaguely articulated strategic objectives and lack of a means to publicly collect data to prove effect. This suggests that development professionals focusing on corruption of the legal system through ADR mechanisms should be comfortable with unsubstantiated results. Therefore, a focus on reforming the formal legal system, although

extremely difficult, may prove to be a preferable development strategy.

5) ADR mechanisms can be a "legal laboratory" of experimental processes and concepts:

ADR's most important contribution to society may be its capacity to serve as a laboratory for trying out new legal processes—vindicating indigenous and modifying existing processes—and by competing with the formal legal system and encouraging parallel legal reforms. ADR is thus "the democratization of dispute settlement rather than an isolation or abandonment of law" (Mowatt 1992, 57).

Often, ADR has been promoted as a process to **indigenize formal legal systems**, in other words to adapt local or traditional dispute resolution mechanisms into the formal legal system (Whitson 1992). Because ADR promotes the perception of what is right or fair for individuals at a particular time in a particular settlement, legal experts have raised the issue that justice or fairness could become localized by the norms of a particular community (Mowatt 1992, 56). Experts are divided about whether this localization (or decentralization) of the legal system is a benefit to society, or whether a focus on local norms will undermine national adherence to general juristic principles (ibid.).

Findings:

- In *India* Whitson found that attempts to decentralize the legal system through various indigenous ADR processes were, in fact, a badly concealed attempt to extend the hegemony of the central state over other parts of the country. Indeed, Whitson termed this effort "traditionalization," or a movement that uses traditional symbols and pursues traditional values but engages in technological and organizational modernization (Whitson 1992, 430).

  ADR was emphasized in India because the non-functioning legal system was a serious threat to the legitimacy of the state's legal authority. The Indian central government felt that ADR would reach and appeal to the village population and help bolster the state's legitimacy by easing tensions of the overburdened formal legal system and substituting the state's norms for those of the non-state legal system (Whitson 1992, 400). Indigenization, then, can be used as a facade for extending central control over local practices.

- When the state incorporates an informal dispute-settlement procedure into the function of the courts, one of its intentions may be to harness the ADR procedures for its own purpose and extend its influence further into society (Mowatt 1992, 52).

ADR can serve as an effective **legal laboratory** in promoting innovative, efficient, and/or

modifying, judicial processes based on its informal and flexible character. Indeed, as Mowatt states, if "law is to remain alive and well it needs, from time to time, the injection of new and perhaps even revolutionary themes" (Mowatt 1992, 58).

Findings:

- A one-year pilot program focused on neighborhood justice centers in *Argentina* has been so successful that attorneys and the judiciary are increasingly demanding ADR mechanisms (NCSC 1995, 1).

- Court-annexed ADR may decrease the procedural efficiencies generated by the laboratory of private ADR mechanisms (Brunet 1987, Np). In other words, some experts are concerned that successful private ADR mechanisms do not translate well to any sort of formal judicial review and control.

- Some *U.S.* courts are influencing, adopting, and improving on ADR-type services (Brunet 1987, Np; Galanter 1972, 54).

Indigenous systems are not, in and of themselves, always just;[11] they could be part of the process of perpetuating unjust, illegal, or even immoral practices. Indeed, the existence of "traditional" or "indigenous" dispute resolution mechanisms themselves has been questioned: Do the traditional mechanisms still exist?; are they more acceptable to the local populations than the formal mechanisms?; and does the effort to "formalize traditional law" (or "indigenize formal law") have any relationship to what local communities will recognize and need (Hammergren 1996)? Certainly, central governments could be promoting the concept of "indigenization" in order to extend control over the hinterland. Thus, indigenization can be an uncertain rationale for promoting ADR processes.

However, evidence does suggest that investments in ADR can have the capacity to modify—perhaps even influence the reform of—formal legal structures by serving as a laboratory for judicial experimentation. This suggests that the "cooption" of the local indigenous system by the formal central system (or the reverse) characterizes a healthy, vibrant, and dynamic dispute resolution system! Thus, the process of learning from ADR experiments can allow formal legal systems the opportunity to incorporate successful ADR mechanisms. The dispute resolution system, on the whole, would be more likely to reflect societal norms.

6) ADR can expand the marketplace of judicial options:

ADR programs can be, in effect, an attempt to apply a market structure to the availability of law (Lieberman and Henry 1986, 8). Private sector ADR, both for profit and not-for profit

[11] Nor, for that matter, are formal legal systems always just.

organizations, all compete with each other and with court-annexed ADR programs. This competition encourages price, service (e.g., providing an attorney or specialization in a certain type of dispute), reputation, location, and format (e.g., mediation versus summary jury trials) differentiation. Such differentiation allows **informed** disputants to select the best available dispute resolution fora for their purposes.

In keeping with this market structure, ADR programs should not attempt to replace the existing legal system but to supplement it by providing alternative fora (Whitson 1992, 407). Thus, the tensions between ADR and the formal legal system; the adoption, absorption, and modification of ADR process by the formal legal system; the creation and supply of new and innovative legal processes through ADR mechanisms; and even the competition and debate between ADR-proponents and defenders of the formal legal system could all be seen as positive signals of healthy and competing components of a vibrant legal system.

Findings:

- In the *U.S.* parties whose cases are diverted from the traditional negotiation-settlement-trial track to an ADR track are more likely to feel that they have been treated fairly by the justice system. These disputants are also more likely to be satisfied with the process and outcomes than parties whose cases are negotiated to a conclusion, with or without judicial intervention, in the form of a settlement conference (Hensler 1995, 1593).

- According to the American Bar Association, and to various legal experts around the world, ADR has taken hold within various court systems and has become increasingly utilized by businesses, governments, and grassroots citizens groups (ABA material, Nd, Np).

- "Judges, lawyers, and litigants who have participated in court-annexed arbitration are reportedly satisfied with the procedure. Data compiled by the [U.S.] Federal Judicial Center show that judges perceive court-annexed arbitration as having a significant effect on reducing civil caseloads, and counsel are generally satisfied that the arbitration hearings are conducted fairly" (Dayton 1991, 24).

One of the major concerns with the plethora of dispute resolution mechanisms is that disputants may be encouraged to appeal unwanted decisions to another mechanism. Experts who have examined the number of appeals following ADR decisions have found that, in the long run, parties eventually ignore a large number of the settlement orders and refile in official courts (Whitson 1992, 421; Pruitt, et al. 1990, 42; see Pruitt 1996, 375). It seems that many disputants change their minds about the quality of an ADR agreement in the months after the hearing and refile or appeal the ADR decision, thus actually adding to the total number of cases going through a trial process, rather than reducing overall caseload.

Potential solutions:

- **Many ADR programs include clauses to settlement agreements making the settlement agreements binding**. In these instances, the parties to the dispute agree, before the settlement process begins, not to refile or challenge the agreement. Indeed, it seems clear that this practice may result in reducing the caseload burden on the formal legal system.

  Many legal experts, however, have challenged that the "binding" nature of some ADR settlements may potentially erode the rights of disputants. For example, if the parties to the dispute agree to binding settlement agreements, and the mediator imposes a settlement without adhering to legal norms (and thus potentially abrogates certain rights of either disputant), then a disputant may not be able to appeal the decision.[12]

  Another way courts can try to discourage appeals of court-annexed decisions is to impose an appeal fee (Kubey 1991, 13). Many times this fee is equal to the cost of the original arbitration.

- **Many commercial contracts contain ADR mechanisms in case of a dispute, and often include language that makes the ADR process mandatory**. Thus, many disputes may automatically be deferred to an ADR process instead of encumbering the formal legal system.

  Some experts have expressed concern that many business people are not always educated about what such an ADR contract component really means.

7) ADR mechanisms improve the quality of dispute resolution processes and dispute solutions:

Both development experts and legal experts suggest that the greatest contribution of ADR to dispute resolution is that the "quality of outcome" may be significantly better from procedures reaching voluntary settlements (Moore 1996) than those reached through the formal, and adversarial, courts. ADR processes seem to produce more just agreements, which increases compliance with agreements (Pruitt, et al. 1990, 43; Loken 1996); and ADR processes seem to improve the relations between the disputants, which also increases long-term satisfaction with the agreement (Pruitt, et al. ibid.; Magno 1996). Thus, ADR decisions are better liked by most

[12] The costs or benefits of mandatory decisions are hotly debated within the literature reviewed. See Reuban, Terrell, or Brunet for further discussions of this issue.

disputants. Simply put, it seems that ADR mechanisms can help resolve conflict by producing higher quality processes and solutions!

- "Mediation is often more democratic and participatory than other forms of dispute resolution"(Menkel-Meadow 1995, 226).

- Although less than a half of court-annexed arbitration awards were accepted in a pilot program of 10 courts; a majority of the disputants found the experience to be useful anyway, as "a starting point for settlement negotiations" (Meierhoefer 1990, 10).

- "[P]roblem solving with an optimistic, creative third-party facilitator can be proactive, creative, positive, synthetic and energizing, rather than argumentative, critical, negative and reactive, as when polarized parties confront each other directly over perceived scarce resources" (Menkel-Meadow 1995, 226).

- "ADR provides substantial benefits to litigants by satisfying their need to tell their story to a neutral" mediator (Stienstra and Willging 1995, 16).

- Both short-term and long-term success of mediation has been found to be related to the "perceived quality" of the process, that is, a belief "that the basic issues had come out, that the mediator had understood what was said, and that the hearing was fair" (Pruitt, et al. 1990, 42).

Legal experts continue to debate the merits of ADR mechanisms, and other experts strive to justify ADR by somewhat futile searching of existing evidence and data. It seems clear, however, that the most impressive and valuable contributions of ADR to the legal system are its ability to add to the marketplace of judicial procedures, to act as a legal laboratory, to compete with the formal legal system, and to improve the quality of dispute solutions and processes.

VI. Tentative Summary of Key Concepts for ADR Programming

Table 1 attempts to aggregate key concepts and concerns from the literature reviewed that seem to be particularly relevant to ADR programs. Column 1 breaks ADR down into two main legal development problems—procedural imperfections and substantive imperfections of the litigation process. Column 2 suggests that procedural imperfections of the litigation process are best dealt with by court-annexed ADR and that substantive imperfections are best dealt with using private ADR. Finally Column 3 examines the appropriateness of ADR for private and public disputes within court-annexed and private ADR. This table is not definitive of ADR concepts but is a tentative effort to summarize those issues that may be most relevant to ADR programming in developing countries.

Row 2, *procedural imperfections of the legal system*, indicates that when there are procedural problems, such as an overburdened legal system, ADR processes should usually be placed within the formal court system. **Reform of the formal legal system may be one of the main objectives of this strategy**. Thus, ADR programs are emphasized as legal laboratories where new and innovative procedures and services are tried out. Formal courts can decide to adopt these new procedures as the standard in the future. Likewise, **strengthening existing legal systems is also relevant to court-annexed ADR programs**. Court-annexed ADR processes can increase the options of disputants looking for procedures sanctioned by the formal legal system. Disputants may be more satisfied with the entire judicial system if they have more legal options. **Increasing the access of marginalized groups to dispute resolution processes may also be relevant to court-annexed ADR programs**. Access of the poor and unempowered groups to ADR processes is relevant when civil rights are protected. Columns 2 and 3 suggest that both private and public disputes are relevant to court-annexed ADR processes because laws and norms are accepted and the legal system is well institutionalized. In both types of dispute, only the details of the dispute need to be decided and agreed upon, so legal precedent is not an issue.

Row 3, *substantive imperfections of the legal system*, indicates that when there are substantive problems, such as corrupt judges and lawyers, ADR processes should usually be placed outside of formal court control. Designers of ADR programs in developing countries may be interested in **bypassing the formal court systems that are frequently unresponsive to reforms.** Thus, private ADR processes can increase the options of disputants looking for procedures sanctioned by business, neighborhood, or indigenous groups—and ignored by or corrupted by the formal legal system. Likewise, **increasing the access of marginalized groups to dispute resolution processes may also be relevant to private ADR programs**. Access of the poor and unempowered groups to any dispute resolution process is generally accepted as a legitimate objective of private ADR programs, when the formal legal system deliberately excludes certain groups.

Column 2 suggests that private disputes are most relevant to private ADR processes in **certain cases** where setting legal precedent is unimportant. Column 3 reveals that non-court annexed ADR may be an **inappropriate** development strategy when dealing with most public disputes when laws are not supported by norms of behavior.

Table 1: Tentative Suggestions for Conceptualizing Alternative Dispute Resolution Programs

Rule of Law Development Problem	ADR Strategy	Type of Dispute	
		Private Disputes	Public Disputes
Procedural imperfections of the litigation process, including: • overburdened legal system • high costs • legal ignorance of technical/scientific issues (e.g., cases that deal with engineering specifications) • marginalized groups lack access to legal system	ADR within Court System (formal court has some sort of oversight or control over ADR processes). ("Court-Annexed" ADR)	ADR is appropriate when laws are clearly accepted as norms; and legal system is well institutionalized. Only the details of the dispute need to be settled. Contributing to legal precedent[13] is not important. • used for civil, tort, and contracts disputes • used in some criminal cases	ADR is appropriate when constitutional and public laws are clearly accepted as norms, and legal system well institutionalized. Because of this, contributing to legal precedent is not important. • used by regulatory agencies • used for labor disputes
Substantive imperfections of the legal process, including: • corrupt and unpredictable court system • culturally unsuitable formal legal mechanisms • marginalized groups lack access to legal system (deliberate exclusion)	ADR outside Court System (formal court has little or no oversight or control over ADR processes, other than allowing them to exist). ("Private" ADR)	ADR can be appropriate even when laws are not clearly accepted as norms and the legal system is not well institutionalized—as long as civil rights are protected. Disputes are resolved by local standards or commercial norms. Setting legal precedent is not important for these types of disputes. • used for neighborhood level, grassroots disputes • commonly used for family disputes, rent disputes, compensation claims, etc. • used for commercial disputes	ADR may be an inappropriate strategy when public laws are not clearly accepted as norms. Legal precedent needs to be se Therefore, ADR decisions could be inconsistent with rule of law. Reform of the formal legal system may be a better development strategy. On the other hand, ADR may used to reach agreements on establishing new norms or law or to negotiate the terms of ne laws or regulations.

[13] A precedent is set when a judicial decision is used as a standard in subsequent similar cases. ADR's utility in clarifying legal precedent in countries where civil law is followed is an issue for some development professionals. In civil law countries, judges traditionally turn exclusively to the provisions of legal codes to make their decisions; in common law countries," judges generally decide cases according to precedent" (Grossman 1994, 619). However, an examination of law review articles found that the role of precedent is far more important in civil law countries than many legal experts have believed (David 1961, 127). If there is no provision to resolve a given case, "a civil-law judge attempts logically to deduce a rule from analogous provisions in the code, as well as from the code's structure and legislative history" (Grossman 1994, 619). Thus, civil law courts **do** apply the rule of precedent to their decisions, although precedent is still less important than in common law courts (Kronman, as cited in Luban 1991, 1048; Schanack 1990, 9; Farber 1996, 519; Norton 1991, 501). In conclusion, when norms of behavior are not reflected by precedent, legal codes, statutes, or other embodiments of law, ADR may be an inappropriate strategy—if the dispute deals with public law issues (such as civil rights, interpretations of the constitution, etc.).

Developed by Heather S. McHugh, USAID/CDIE/R&RS, 1995.

VII. Conclusion: Revisiting the Development Objectives for ADR

Thus far, the focus of the development argument for ADR has been that when the poor lack access to the formal legal system, create or support ADR processes. When huge case loads overwhelm the formal legal system, try ADR. To reduce the costs of the formal legal system, implement ADR! And if the formal legal system is corrupt and unpredictable, fund ADR programs instead!

The preliminary evidence suggests that funding ADR processes based on these four development objectives may be fraught with difficulty and inconsistency. Although this report has suggested potential solutions to rectify some of the problems with implementing programs based on these four reasons, it is apparent that the local context of each country, region, and village is key in justifying the addition of an ADR component to rule of law projects. Therefore, development experts should first evaluate the possibility of devising mechanisms to reform the formal legal system, instead of automatically promoting ADR systems (Whitson 1992, 444). In these times of scarce resources, many experts promote the concept that it is more advantageous to invest in ADR than to become embroiled in costly reforms of the formal legal system. But, if the costs associated with ADR are higher than expected, and the results of ADR projects are still ambiguous, it may be that reform of the formal legal system is the better development choice.

However, when the last three development reasons for funding ADR processes are examined, a different picture emerges. If ADR programs include objectives focused on the provision of a legal laboratory of judicial processes and concepts, the goal of expanding the marketplace of judicial options, and the possibility of improving satisfaction with dispute solutions, then perhaps ADR is the better development choice, compared to efforts to directly reform the legal system. Indeed, it seems that the popularity of ADR stems less from public dissatisfaction with the time and cost of litigating in regular courts and more from the **perceived** intrinsic merits of ADR (Whitson 1992, 418).

Finally, this paper points to the need for more research, particularly data collection on dispute resolution systems in developing countries, before the full capacity of ADR mechanisms can be effectively evaluated. The dearth of practical information encountered during the course of research for this paper justifies only preliminary hypotheses and suggestions of trends and possibilities about ADR programming. Development professionals, in particular, could contribute tremendously to the collection of data from the field. Baseline surveys, public opinion polls, focus groups, and other data collection methods could be used not only to improve ADR programming and the measurement of impacts, but also to increase overall knowledge about field-based ADR.

In the meantime, it seems safe to conclude that ADR processes contribute to the democratization of rule of law—by increasing the marketplace of dispute resolution options, by increasing satisfaction with dispute solutions, by contributing to the decentralization of legal systems, and by increasing citizen participation in dispute resolution mechanisms. Thus, ADR narrows the

"gap between legal ideology and the perceived realities of the individual in society" (Mowatt 1992, 58)—it democratizes the legal decision-making process (Wildau 1993, 306). Although conflict is inherent in healthy societies, it is the institutionalization of peaceful change—conflict management, in other words—that challenges development professionals and societies around the world. ADR, in the end, seems to be a valuable development mechanism to encourage the peaceful management of conflict and the successful resolution of disputes.

Annex A:USAID Experience

Of the USAID ADR projects identified from the CDIE Document Information System Databases, 50 percent of the Agency's experience is concentrated in Latin America and the Caribbean (LAC). Over a third of USAID experience with ADR is located in Asian countries, and Africa falls far behind. A review of the project descriptions also shows that USAID has been engaged in ADR-like activities since the 1970s in LAC. Although no ADR projects showed up in either the ENI region or the Middle East, it could be that these projects are new and still undocumented (at least in Washington, DC), or that they are couched in terms not identifiable with ADR.

TABLE 2: USAID Projects with ADR Components

Project #	Country	Year	Project Title	ADR Component *[Development Objectives]*
2980383	ANE	FY 96-99	Fostering Resolution of Water Resources Disputes	Trans-border dispute resolution
3670163	Nepal	FY 92 - 96	Nepal Democracy Project	Community (village-level) dispute resolution *[cost-effective, timeliness, increased access]*
3830119	Sri Lanka	FY 94-00	Citizen Participation	Modernize the legal system by enhancing the capabilities of the formal and informal legal systems (ADR)
3910481	Pakistan	FY 83-91	Forestry Planning and Development	Training in ADR for natural resources management
3980251	Asia Regional	FY 85-Cont.	Near East Regional NGO Project	Mediation and conciliation
3980289	Near East Regional	FY 87-95	Irrigation Support for Asia/Near East	Water resource management dispute resolution practices
4420111	Cambodia	FY 92-96	Democratic Initiatives	Conflict resolution within and outside court structures
4920470	Philippines	FY 93-97 (C)	PVO Co-Financing IV	ADR
4990002	Asia Regional	FY 91-95	Asia Democracy Program	Restoration of a traditional "informal justice" system (emphasis on labor disputes) *[indigenization]*
4990002-subproject	Nepal	FY 90	Asia Democracy Program—Women's Legal Services Project	Mediation services, and helped women get redress from semi-judicial offices *[increased access*

Project #	Country	Year	Project Title	ADR Component *[Development Objectives]*
				of marginalized group]
4990002-subproject	Nepal	FY 90, 92	Asia Democracy Program—Institutional Development and Arbitration Project	Modernize Nepal's arbitration system
4990002-subproject	Philippines	FY 90-93	Asia Democracy Program—Alternative Dispute Resolution	Local Government Development Foundation project assistance to the Barangay Justice System
4990002-subproject	Philippines	FY 90-92	Asia Democracy Program—Improving Access to Justice	Alternative law schools
4920419	Philippines	FY 89-93	Trade Union/Workers Training Programs	Voluntary arbitration training
4920470-subproject	Philippines	FY 93-97	PVO Co-Financing IV	Mediation and arbitration among business leaders in Manila, through the Council for the Non-Court Resolution of Disputes (CONCORD); to support alternative legal groups
5110609	Bolivia	FY 88-93	Justice Sector Project	Establish a legal framework for alternative "conflict" resolution *[judicial reform]*
5110626	Bolivia	FY 92-97	Adjudication of Justice	Strengthen alternative dispute resolution mechanisms *[timeliness]*
5149002	Colombia	FY 91-94	Justice Sector Reform	Strengthen conciliation system *[timeliness, legal reform]*
5150244	Costa Rica	FY 88-95	Justice Sector Improvement Project	Amendment 2/25/93: added alternative dispute resolution
5150271	Costa Rica	FY 92-95	Justice Sector Improvement II	Strengthen alternative dispute resolution mechanisms, especially for civil cases
5170267	Dominican Republic	FY 93-99	Trade Practices and Productivity Improvement	Labor arbitration
5180000	Ecuador	FY 78-Cont.	Program Development & Support	Promote alternative conflict resolution methods
5180115	Ecuador	FY 92-93	Justice Sector Development	Reform the informal judicial sector *[legal reform]*
5190373	El Salvador	FY 90-94	Judicial Information	Continuing legal education,

Project #	Country	Year	Project Title	ADR Component *[Development Objectives]*
			Systems	including alternative dispute resolution methods
5190394	El Salvador	FY 92-97	Peace and National Recovery	ADR
5210238	Haiti	FY 93-97	Administration of Justice	Work with the justices of the peace on ADR practices
5240316	Nicaragua	FY 91-98	Strengthening Democratic Institutions	Pilot ADR in communities and schools
5270373	Peru	FY 89-94?	Judicial Sector Support	Promote alternative dispute resolution
5320175	Jamaica	FY 92-96	Sustainable Justice Reform	Strengthen alternative dispute resolution mechanisms *[reduce stress on overburdened legal system]*
5980616	LAC Regional	FY 84-Cont.	Intercountry Technical Transfer	Uruguay: ADR for legal systems strengthening
5980642	LA Regional	FY 86-Cont.	Regional Administration of Justice	Chile: alternative conflict resolution *[increased access by marginalized group]* Uruguay: ADR for legal systems strengthening
5980797	LAC Regional	FY 91-95	Trade and Investment Development	Haiti: ADR
6110230	Zambia	FY 92-97 (C)	Privatization Support	To speed up privatization negotiation process, ADR training is provided
6210182	Tanzania	FY 95-97	Democracy and Governance Initiatives	ADR to reduce backlog and promote faster dispute resolution
6450231	Swaziland	FY 90-95	Training and Institutional Development	Dispute resolution in industrial courts
6740301	S. Africa	FY 94-98	Community Outreach & Leadership Development (COLD)	Alternative dispute resolution training, education, and support
6740306	S. Africa	FY 82-89	Building Democracy Institutions	ADR
6740312	S. Africa	FY 92-96	Shelter and Urban Development Support	ADR for squatters
6870115	Madagascar	FY 91-96	Knowledge and	Local level conflict management

Project #	Country	Year	Project Title	ADR Component *[Development Objectives]*
			Effective Policies for Environmental Management	for natural resources management, including ADR
6870125	Madagascar	?	Participation and Poverty	Develop ADR frameworks for use by micro and small scale enterprises
6870510	Madagascar	FY 88- Cont.	Program Development and Support	ADR for use by micro and small scale enterprises
6880246	Mali	FY 91-96	Policy Reform for Economic Development	ADR
6900280	S. Africa	Planned	Initiative for Southern Africa	Could have an alternative dispute resolution component
7300311	Vietnam	FY 67-76	Land Reform	ADR
9300092	Eastern Europe	FY 80-Cont.	Economic Research	ADR for fiscal and monetary disputes
9362750	LAC	FY 92-Cont.	Women's Organizations and Participation	ADR
9365554	S&T Bureau	FY 88-97	Conservation of Biological Diversity	ADR for Geological Information Systems development
9400015	NIS	FY 90-96	Institutional Reform and the Informal Sector (IRIS)	ADR

Of the USAID projects mentioned above, four of them are worth describing within the framework established in this paper:

Adjudication of Justice Project, Bolivia, Project number 5110626, (Document Number PDABI526): This project focuses on fast track oral and adversarial procedures for certain minor cases and includes a component to establish private "extra-judicial" community centers for the mediation of family disputes.

Development Objective: to reduce delay in settlement agreements
Strategy: a court-annexed arbitration program where courts refer some of their caseload to another forum
Sequencing: unknown
Type of disputes: small claims, divorce, and inheritance cases

Justice Sector Reform, Colombia, Project Number 5149002, (Document Number PDABD423): The ADR subcomponent of this project attempts to institutionalize the conciliation system in the country by focusing on education materials, training in conciliation, and providing expert advice.

Development Objective:	reform of the judicial system, reduce delay in settlement agreements
Strategy:	a privately funded conciliation program with centers established in chambers of commerce, law school legal clinics, and public centers with volunteer conciliators
Sequencing:	ADR mediation is required before cases are referred to the formal legal system
Type of disputes:	all labor, and most civil, traffic, administrative, and family disputes

Nepal Democracy Project, Project number 3670163, (Document Number PDABE875): This project attempts to establish tradition-based ADR processes in competition with the formal legal system in selected areas of the country. Problems encountered during the implementation of the project included the concern that the village councils made decisions beyond their jurisdictional authority.

Development Objective:	to reduce delay in settlement agreements, create more cost-effective legal fora, and to improve access of marginalized groups
Strategy:	a privately funded mediation program where village councils resolve the majority of disputes
Sequencing:	unknown
Type of disputes:	unknown

Philippines PVO Co-Financing IV Project, Project number 4920470: This ADR subproject seeks to promote mediation and arbitration among business leaders in Manila. The Mission is considering future support for ADR at three levels: the business community, disadvantaged groups, and the Barangays.

Development Objective:	to provide an alternative to expensive and arbitrary litigation
Strategy:	to establish the Council for the Non-Court Resolution of Disputes (CONCORD) as a mediation center in Manila
Sequencing:	unknown
Type of disputes:	commercial

Annex B: Preliminary Lessons Learned and Performance Measurement

Lessons Learned:

Although limited, USAID's experience with court-annexed ADR programs in developing countries reveals several tendencies that should be considered when designing and implementing ADR projects. The following tendencies are drawn directly from three key documents—two funded by USAID and one by the National Center for State Courts. Other documents contributed indirectly to these preliminary lessons learned.

Building an ADR constituency:

- There should be an expressed and active support for ADR within a given society (USAID [1993]:39). **Public** awareness and understanding must be developed, for example, through seminars and conferences, information campaigns (advertizing, posters, fliers, brochures, comics, etc.), and research (study and improve the existing modes of ADR in search of potential changes and evaluate existing systems) to build a supportive constituency (NCSC 1995, 2; USAID July 1992; USAID [1993], 39; AAFLI Nd., 2; Layton 1993, 141).

- Any attempt to establish an ADR system must be accompanied by efforts to gain the support of the **legal/judicial profession** (in particular, the bar) (USAID July 1992). For example, in many programs lawyers resist representing parties before the ADR courts because of reduced fees. One solution was for the state to establish fixed fees for lawyers in an ADR process (Whitson, 419).

- ADR programs need the leadership and support from government at its highest levels in order to be successful and become institutionalized (NCSC 1995, 2; USAID 1987, Annex F, Np). Thus, successful ADR programs should work with the **legislature** and **ministry of justice** to create both a powerful constituency for ADR and to help design appropriate legislation for ADR (USAID July 1992; Brock 1991, 77).

- **Police** should be generally integrated in ADR programs focused on criminal cases in order to prevent both delay and preselection of information (Bilsky 1990, 371).

- All of the above suggest that there "must be **sufficient dissatisfaction with the status quo** to force otherwise disparate interests together to form a new mechanism and to sustain that coalition during early stages of a system's operation" (Brock 1991, 78).

Training of ADR providers:

- A potential lesson learned from *New Jersey* indicates that in the short term ADR may actually increase the time needed before a decision is reached, while the parties and legal representatives involved become more familiar with the ADR processes (see Hensler 1990, 410). Thus, a cadre of individuals trained and skilled in ADR should be formed before the program starts (NCSC 1995, 2).

Timing:

- The development of ADR mechanisms take time (Brock 1991, 79). "Not only are the design issues complicated, but the necessity to build consensus and handle the concerns of the user groups is also complex" (ibid.).

Design of ADR projects:

- Large-scale initiatives should not be the first step, rather, they should follow pilot projects so that procedures and structures are tested first (NCSC 1995, 2; Brock 1991, 81).

- The "more public, political, or controversial the problem, the more difficult it will be to establish" ADR systems (Brock 1991, 78). The hotter the topic, the more likely the solutions will be subject to simplistic rhetoric and slogans (ibid.). Choose a less controversial topic or type of problem to introduce institutionalized ADR mechanisms.

- Seek other models of ADR by looking at the experience of other countries or societies. These could be adapted or revised to suit the peculiarities of a given society (USAID [1993], 39). However, these other mechanisms should not be automatically adopted to suit the local situation—the mechanism should be developed to fit the context of what is happening locally (Brock 1991, 81; Wildau, et al. 1993, 306-307).

- When dealing with issues of corruption, courts and judges may not be the most effective vehicles for the initiation of mediation and ADR techniques in a legal system (Blair, et al. 1994, 47).

- The structures of ADR systems should not be overly standardized or bureaucratized, which would limit the flexibility and workability of dispute resolution to adapt to fit the problem (Brock 1991, 78).

- A forum for developing ADR mechanisms could be created in order to negotiate

over a wide variety of options. This forum should be dominated by local principals and "not staff or outside experts" (Brock 1991, 80). "Useful ideas and analysis may come from staff and experts, but the mechanism must be a product of agreement among those who must use, support, and sell it" (ibid.).

- International ADR consultants should be familiar with the problems the host society is addressing, aware of effective local and international approaches, and have a "through understanding of prescriptive and elicitive pedagogical methodologies" (Wildau, et al. 1993, 307).

Performance Measurement:

A review of USAID evaluations of ADR and a subsequent analysis of USAID's Performance Management and Evaluation System's PRISM project database (which tracks the strategic objectives of Missions, and the indicators suggested to measure impact) found that there are few ADR activities that are articulated as program or strategic objectives. However, those few existing measurements suggested by Missions focused on the number of cases settled by ADR and the number of ADR centers established.

Number of cases:

- The number of cases settled by semi-formal local dispute resolution procedures in selected areas—measured by an increase in the number of cases settled (USAID July 1992, Annex F).

- Disputes in project areas mediated through village councils—measured as a percentage of successful mediation actions divided by number of mediation actions initiated by project (PRISM, Bangladesh CPSP 1995-1997).

Number of ADR centers:

- ADR centers established—measured by an increase in the number of ADR centers (PRISM, Bolivia Action Plan FY 96-97).

- ADR mechanisms introduced for civil/commercial court cases—measured by the number of ADR centers that actively receive cases (PRISM, Costa Rica Action Plan FY 95-96).

Annex C: Other Major Questions and Issues to Consider

The following are questions and issues that development professionals should consider when designing and implementing ADR projects. The concepts raised in these five questions were intimated throughout the literature reviewed but are beyond the scope of this paper to address more comprehensively.

1) Does the level and strength of democracy and the judicial system in a country make a difference to when or if ADR projects should be implemented? Implicit in the arguments presented in this report is the concept that sustainable development countries are the obvious types of countries where donors should be investing in ADR. Is this the case?

2) Would transitional societies benefit from the creation of ADR mechanisms, or should donors concentrate their investments in reforming often grossly inadequate and corrupt legal systems? If transitional societies are struggling with defining and creating public law, then the answer should be negative. If transitional societies have an accepted body of public law, then ADR may be worth the investment to deal with fine-tuning legal procedures. Does the evidence from the field justify these suppositions?

3) Often ADR programs are adopted as part of a decentralization effort where local (traditional) legal institutions are combined with the state's formal legal system. Thus, ADR programs can sometimes have two conflicting goals: on the one hand, they promote local self-rule, on the other hand, they promote the laws and values of the central government (Whitson 1992, 427-429). Is this combination/compromise viable?

4) Private ADR is a business. Experts are concerned that there could be an inherent conflict of interest in privately funded ADR, as an ADR provider might pursue repeat business from high-volume customers (Reuban 1994, 54; Johnson 1993, 20). Other experts counter that, just as logically, decisions could be based on the conclusion that future business depends on establishing a reputation for fairness (Rolph 1995, np). Some systems specifically exclude commercial use of ADR because it is felt that the benefits of ADR should be directed toward those who can not afford regular legal processes (see Whitson 1992, 412, 417). Should donors support commercial ADR processes?

5) Although it is key to gain the endorsement of the host government, program designers should consider the motivations fomenting host governments' support of ADR projects. Many experts suggest that ADR programs are the state's attempt to exercise judicial authority over the villages—under the guise of decentralization and delegalization (Whitson 1992, 428). Furthermore, when states incorporate an informal dispute-settlement procedure into the function of the courts, its covert intention could be to harness or subvert the procedures for its own purposes and to extend its influence and own sense of justice further into society (Mowatt 1992, 52; Whitson 1992, 433, 435). Donors may need to examine and understand host government's motives for supporting

ADR programs in order to determine whether objectives are compatible.

6) With the institutionalization of ADR, concerns about the regulation and professionalism of the dispute resolvers—those who serve as a neutral—have been raised (Singer 1990, 168-169). What, if any, training, experience, and/or degrees in ADR-related areas work best in the developing country context? Does the type of dispute require different training, experience, and/or degrees for the neutral?

Annex D: Suggested Design of ADR Programs

Unless otherwise indicated, the following information comes from an article by Cathy A. Costantino titled "Using Interest-Based Techniques to Design Conflict Management Systems" (Costantino 1996, 207-214). This article seems particularly relevant to USAID development practitioner concerns and reengineering principles.

Assessment: The design participants need to assess the society's culture and attitudes toward conflict; the types, numbers, nature, and costs of disputes; the resolution methods (prevention, use of formal or informal techniques, and who decides which method to use); and the results (cost, durability, satisfaction, and effect on disputants and legal system). Assessments can be done through surveys, key informant interviews, and focus groups.

Design: Once a decision has been made (based on the assessment) to reform the conflict management system, the following six principles should be followed:

- **"Develop guidelines for whether ADR is appropriate:"** Ask the following questions: "Is ADR appropriate for this type of conflict, and if so, what type of ADR" (210)?

- **"Tailor the ADR process to the particular problem:"** The ADR method should meet the interests of the particular dispute and disputants. "For example, choosing mediation when, in fact, the nuances of the particular case and the interests of the disputants indicate that neutral fact-finding would be more appropriate can lead to a conclusion that ADR is not effective when the mediation is not effective" (210).

- **"Build in preventive methods of ADR:"** Preventive methods (partnering, joint problem solving, and negotiated rule-making) can be effective. "It may be useful for the designer[s] to think of developing a range of preventive methods in a variety of contexts, such as the individual, the group, the organization, the community, and within the global environment" (210).

- **"Make sure that disputants have the necessary skills and knowledge to choose and use ADR:"** Disputants need to know not only what the ADR process is, but how to access it effectively (210). Public outreach, education, and training programs should be introduced.

- **"Create ADR systems that are simple to use and easy to access, and that resolve disputes early, at the lowest organizational level, with the least bureaucracy:"** Disputants must feel that ADR is easier to use, faster, and more effective than the current dispute resolution process. The tendency of many ADR

practitioners is to over-control the process (211). Resist!

- **"Allow disputants to retain maximum control over choice of ADR method and selection of neutral [arbitrators/mediators] wherever possible:"** Disputants are more likely to resist ADR processes if they are not involved in the selection and determination of who the neutral mediator/arbitrator will be (211).

Training and Education:

ADR education must be a dynamic, ongoing process of "increasing awareness about conflict, responses to it, and choices about conflict management" (211). ADR training should be skills and competency based.

Consciousness-raising efforts are aimed at changing attitudes but rarely lead to changes in behaviors (Wildau, et al. 1993, 309). "To be successful ... consciousness raising efforts must be linked" to other initiatives such as workshops, university-based initiatives, capacity building in existing institutions, issue-specific interventions, etc. (ibid.,309-311).

Implementation:

Start small, with a time-limited, clearly defined pilot project in order to determine the willingness of the stakeholders to change (213). This pilot effort can also help to uncover hidden costs, overly high expectations, and attitudes that may impede adoption of the new system (213). It is useful to look to other sources for experience, expertise, and success stories. Then, test the pilot in other locations, tailor it to the new context, go public with the success of the pilot, and use an ADR team or task force to monitor the efforts (213).

Evaluation:

The activities should be evaluated throughout the life of the project, from design to end. A rolling-evaluation and design is recommended (214). In particular, ADR effectiveness and impact can be measured through: the nature of the outcomes; durability of the resolutions; effect on the system; and satisfaction with the process, relationships and outcomes. ADR program administration and operation can be measured through: structures and procedures established; guidelines and standards adopted; sustainability of resources; service delivery (access, selection of cases, etc.); and program quality (training and education, selection of neutral arbitrators/mediators, and competence of arbitrators/mediators).

Annex E: ADR Contacts

The following information was derived from the USAID Contracts Database and from input provided by USAID Mission staff. There are numerous other organizations and individuals engaged in ADR activities, but these are the ones most closely identified with USAID development programs.

USAID-funded

African Center of the Constructive
Resolution of Disputes
University of Durban-Westville
Private Bag X54001
Durban 4000, Republic of South Africa
Experience: South Africa
Contact: Mr. Vasu Gaunden
Telephone: 27-21-959-3258

Alternative Law Group
Suite 1207 Makati Building
6776 Ayala Avenue
Makati City, Philippines
Experience: Philippines
Contact: Johannes Ignacio
Telephone: (632) 891-1246

The Asia Foundation
465 California Street
P.O. Box 193223
San Francisco, CA 94104-3223
Experience: Indonesia, Philippines, Sri Lanka
Contact: Pamela Hollie—Philippines, Phone: 632 832 1466
Telephone: (415) 982-4640

Bolivian Chamber of Commerce
Avenida Mcal Santa Cruz No. 1392
La Paz, Bolivia
Experience: Bolivia
Contact:
Telephone: 591-2-786544

Center for Applied Legal Studies
Private Bag 3
Witswatersrand 2050
Republic of South Africa
Experience: South Africa
Contact: Dennis Davis
Telephone: 011-403-6918

Community Dispute Resolution Trust
Aukland House
185 Smit Street
7th Floor East Wing
Braamfontein 2001
Republic of South Africa
Experience: South Africa
Contact: Ms. Tshebeletso Makhetha
Telephone: 011-716-3694

Corporacion de Promocion Universitaria
Avenida Miguel Claro, 1460
Santiago, Chile
Experience: Chile
Contact:
Telephone: (562) 274 - 2911

Dispute Resolution Foundation Limited
c/o United Way of Jamaica
32 1/2 Duke Street
Kingston, Jamaica
Experience: Jamaica
Contact: Donna Parchment

Telephone: (809) 967-4408

Federation of Swaziland Employers
PO Box 777
Mbabane, Swaziland
Experience: Swaziland
Contact:
Telephone:

Free Legal Assistance Volunteers
Room 207, Mingson Bldg.
Zamora Street
Cebu City, Philippines
Experience: Philippines
Contact: Esperanza Valenzona
Telephone: 63-2-522-4411

Independent Mediation Service of South Africa
PO Box 91082
Auckland Park
Republic of South Africa
Experience: South Africa
Contact: Ms. Thandi Orelyn
Telephone: 011-482-2390

Institute for a Democratic Alternative
39 Honey Street
Berea, Johannesburg
Republic of South Africa
Experience: South Africa
Contact: Paul Graham
Telephone: 011-484-3694

Inter-American Bar Foundation
1819 H Street, NW
Suite 320 A
Washington, D.C. 20006
Experience: Bolivia, Argentina, Colombia, Costa Rica, Dominican Republic, El Salvador, Venezuela
Contact: Mr. Andreas Barreto
Telephone: (202) 293-1455

Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD)
San Jose, Costa Rica
Experience: Latin America Regional
Contact: Rodrigo Paris Steffens, Director
Telephone: (506) 257-5826

National Center for State Courts
1700 N. Moore Street
Suite 1710
Arlington, VA 22209
Experience: Latin America
Contact: Madeleine Crohn
Telephone: (703) 841-0200

National Training Program in Conflict Handling
c/o Funda Center
PO Box 359
Orlando 1804
Republic of South Africa
Experience: South Africa
Contact: Mr. Azi Zikalala
Telephone: 011-938-1485

Nepal Law Society
Ram Shas Path
Kathmandu, Nepal
Experience: Nepal
Contact:
Telephone:

Overseas Education Fund (OEF)—DEFUNCT
1815 H Street, NW 11th Floor
Washington, DC 20006
Experience: Central America
Contact:

Telephone:

Experience: Ecuador
Contact: Elizabeth Garcia
Telephone: 593-2-506-635

Team Technologies, Inc.
Monroe Business Center
620 Herndon Parkway, Suite 350
Herndon, VA 22070
Experience: Senegal
Contact: Catherine Silansky
Telephone: (703) 222-5555

Inter-American Development Bank
1300 New York Avenue, NW #W300
Washington, D.C. 20577
Experience: Colombia, Peru
Contact: Christina Biebsheimer
Telephone: (202) 623-2741

Vuleka Trust
PO Box 88
Botha's Hill 3660
Republic of South Africa
Experience: South Africa
Contact: Mr. Athol Jennings
Telephone: 031-777-1363

Inter-American Foundation
901 N. Stuart Street
10th Floor
Arlington, VA 22203
Experience: Ecuador, Chile, Peru
Contact: Chuck Claymeyer
Telephone: (703) 841-3800

<u>Non-USAID funded</u>

American Bar Association
1800 M Street, NW
Washington, DC 20036
Experience: Central America
Contact:
Telephone: (202) 662-1000

Asociacion Peruana de Negociacion,
Arbitraje y Conciliacion (APENAC)
Calle Cura Behar No. 140
San Isidro, Lima
Peru
Experience: Peru
Contact: Eduardo Moane
Telephone:

Centro Sobre Derecho Y Sociedad
Avenue Goy Alfaro 355
Casilla Postal 17-21-451 Quito
Ecuador

References Cited

AAA. Nd. "A Beginners' Guide to Alternative Dispute Resolution." Downloaded from the Internet, WWW address "http://www.adr.org/guide.html". *In addition, this WWW site also provides various bibliographies that may be relevant to specific ADR programs. One potentially relevant bibliography (a bibliography of bibliographies) can be located at "http://www.adr.org/biblist.html". There is a small charge for each bibliography.*

AAFLI. Nd. "AAFLI Support and Assistance in the Voluntary Arbitration Program in the Philippines." Prepared by the National Conciliation and Mediation Board, Department of Labor and Employment. Asian-American Free Labor Institute: Washington, DC.

American Bar Association. Nd. "Overall Assessment: The Dispute Resolution Field." American Bar Association, Standing Committee on Dispute Resolution: Washington, DC.

Barnes, Alison Patrucco. Summer 1992. "Elder Law: Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care." Emory Law Journal, Vol. 41, pp. 633-.

Benjamin, Michael and Howard H. Irving. Fall 1995. "Research in Family Mediation: Review and Implications." Mediation Quarterly, Vol. 13, No. 1.

Bevis, Gwendolyn G. March 1996. Memo responding to draft paper on ADR. Management Systems International: Washington, DC.

Bilsky, Wolfgang. October 1990. "Extrajudicial Mediation and Arbitration: Evaluation of German Victim-Offender-Reconciliation Programs." The International Journal of Conflict Management, Vol. 1, No. 4.

Blair, Harry and Gary Hansen. February 1994. "Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs." Center for Development Information and Evaluation, Program and Operations Assessment Report No. 7. USAID: Washington, DC. PNAAX280.

Blair, Harry, Mary Staples Said, Joseph Thome, and Christopher Sabatini. September 1994. "A Strategic Assessment of Legal Systems Development in Uruguay and Argentina." Center for Development Information and Evaluation, USAID Working Paper No. 192. USAID: Washington, DC. PNABT455.

Brett, Jeanne M, Zoe I. Barsness, and Stephen B. Goldberg. July 1996. "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers."

Negotiation Journal, Vol. 12, No. 3.

Bridges, George S. 1982. "Criminal Law: The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation." Journal of Criminal Law and Criminology, Vol. 73, No. 50.

Brock, Jonathan. 1991. "Mandated Mediation: A Contradiction in Terms: Lessons from Recent Attempts to Institutionalize Alternative Dispute Resolution Practices." Villanova Environmental Law Journal, Vol II, pp. 57-.

Brunet, Edward. November 1987. "Questioning the Quality of Alternative Dispute Resolution." Tulane Law Review, Vol. 62, pp. 1-.

Constantino, Cathy A. July 1996. "Using Interest-Based Techniques to Design Conflict Management Systems." Negotiation Journal, Vol. 12, No. 3.

Coulson, Robert. 1992. "Will the Growth of Alternative Dispute Resolution (ADR) in America be Replicated in Europe?" Journal of International Arbitration, Vol. 9, No. 3.

Crohn, Madeleine L. February 1996. Telephone interview in response to draft paper on ADR. National Center for State Courts.

David, Rene. 1961. "On the Concept of 'Western' Law." Translated by William Jeffrey, in the University of Cincinnati Law Review, Vol. 52, pp. 126-.

Dayton, Kim. July 1991. "The Myth of Alternative Dispute Resolution in the Federal Courts." Iowa Law Review, Vol. 76, pp. 889-.

Development Associates. April 1993. "Asia Democracy Program Evaluation Report." USAID, Bureau for Asia: Washington, DC. PDABG648.

Edwards, Harry T. January 1986. "Commentary: Alternative Dispute Resolution: Panacea or Anathema?" Harvard Law Review, Vol. 99, pp. 668-.

Farber, Daniel A. January 1996. "Book Review: The Hermeneutic Tourist: Statutory Interpretations in Comparative Perspective. Cornell Law Review, Vol 81, pp. 513-.

French, Bruce Comly. Winter 1993. "More Effective Citizen Participation in Environmental Decision-Making." University of Toledo Law Review, Vol. 24, pp. 389-.

Galanter, Marc. 1972. "The Aborted Restoration of 'Indigenous' Law in India." Comparative Studies in Society and History, Vol. 14.

Golub, Stephen, Eugenio Gonzales, and Antonio G.M. La Vina. February 1994. "A Strategy for

Improving Access to Justice: Final Report." Bureau for Private Enterprise. USAID: Washington, DC. PNABT331.

Grossman, Lewis. March 1994. "Essay: Codification and the California Mentality." Hastings Law Journal, Vol. 45, pp. 617-.

Hammergren, Lynn. June 1996. Memo in response to draft paper on ADR. USAID/G/Center for Democracy and Governance.

Hensler, Deborah R. 1990. "Court-Ordered Arbitration: An Alternative View." The University of Chicago Legal Forum, pp. 399-.

_____. June 1995. "A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation." From a Symposium, National Mass Tort Conference. Texas Law Review, Vol. 73, pp. 1587-.

Hill, Richard. July 1995. "Non-adversarial Mediation." Downloaded from the Internet, WWW address "http://www.batnet.com/oikoumene/tacr.htm".

_____. 1995a. "Overview of Dispute Resolution." Downloaded from the Internet, WWW address "http://www.batnet.com/oikoumene/tacr.htm".

Houseman, Alan W. Summer/Fall 1993. "ADR, Justice, and the Poor." NIDR Forum.

Ippolito, Carol A. and Dean G. Pruitt. October 1990. "Power Balancing in Mediation: Outcomes and Implications of Mediator Intervention." The International Journal of Conflict Management, Vol. 1, No. 4.

Jacobs, Joel S. Winter 1995. "Compromising NEPA? The Interplay Between Settlement Agreements and the National Environmental Policy Act." The Harvard Environmental Law Review, Vol. 19, pp. 113-.

Johnson, Kirk. December 10, 1993. "Public Judges as Private Contractors: A Legal Frontier." The New York Times, Section D, Page 20, Late Edition.

Kamberis, Harry G. March 1996. Memo in response to draft paper on ADR. Asian-American Free Labor Institute.

Kheel, Theodore W. Nd. "A Total Approach to Conflict Prevention and Resolution Under ADR's Umbrella." From Internet.

Kubey, Craig, and the Editors of Consumer Reports Books. 1991. You Don't Always Need a Lawyer: How to Resolve Your Legal Disputes Without Costly Litigation. New York: Consumer

Reports Books.

Layton, Robert. June 1993. "Changing Attitudes Toward Dispute Resolution in Latin America." Journal of International Arbitration, Vol. 10, No. 2.

Lieberman, Jethro K. and James F. Henry. Spring 1986. "Symposium on Litigation Management: Lessons from the Alternative Dispute Resolution Movement." University of Chicago Law Review, Vol. 53, pp. 424-.

Luban, David. May 1991. "Legal Traditionalism." Stanford Law Review, Vol. 43, pp. 1035-.

Loken, Kristen. March 1996. Memo in response to draft paper on ADR. USAID/El Salvador.

Magno, Lisa Rose. March 1996. Memo in response to draft paper on ADR. USAID/Philippines.

Massachusetts Lawyers Weekly (MLW). June 22, 1992. "The Privatization of Justice." Massachusetts Lawyers Weekly.

Menkel-Meadow, Carrie. July 1995. "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices." Negotiation Journal, Vol. 11, No. 3.

McHugh, Heather S. March 1995. "Inventory of USAID Activities: Conflict Resolution, Preventive Diplomacy, Early Warning Systems, and Relief to Development (DRAFT)." USAID/PPC. USAID: Washington, DC.

McMillan, Jr., Richard and David B. Siegel. 1985. "Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure." Notre Dame Law Review, Vol. 60, pp. 431-.

Meierhoefer, Barbara S. 1990. Court-Annexed Arbitration in Ten District Courts. Federal Judicial Center: Washington, DC.

Moore, Christopher W. March 1996. Memo in response to draft paper on ADR. CDR Associates.

Mowatt, J.G. March 1992. "Alternative Dispute Resolution: Some Points to Ponder." The Comparative and International Law Journal of Southern Africa, Vol. 25, pp. 1-.

National Center for State Courts. October 1994. "First Interamerican Meeting on Alternative Dispute Resolution: Final Report." Report from a meeting held in Buenos Aires, November 7-10, 1993. National Center for State Courts and Fundacion Libra: B.A., Argentina.

_____. June 1995. "ADR in Latin America." Rule of Law Reporter.

Norton, Patrick M. July 1991. "A Law of the Future or a Law of the Past? Modern Tribunals and the

International Law of Expropriation." The American Journal of International Law, Vol. 85, pp. 474-.

PRISM. January 1996. "PRISM Database Search Results: ADR." Printout. USAID/CDIE/PME Performance Management and Evaluation Office, PRISM Project. USAID: Washington, DC.

Pruitt, Dean G., Robert S. Pierce, Jo M. Zubek, Gary L. Welton, Thomas H. Nochajski. January 1990. "Goal Achievement, Procedural Justice and the Success of Mediation." The International Journal of Conflict Management, Vol. 1, No. 1.

Pruitt, Dean G. October 1995. "Process and Outcome in Community Mediation." Negotiation Journal, Vol. 11, No. 4.

Rauma, David and Carol Krafka. 1994. Voluntary Arbitration in Eight Federal District Courts: An Evaluation. Federal Judicial Center: Washington, DC.

Reif, Linda C. 1990-1991. "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes." Fordham International Law Journal, Vol. 14, pp. 3-.

Reuban, Richard C. February 1994. "The Dark Side of ADR." California Lawyer, Vol. 14, No. 2, pp. 53-.

Roehl, Janice A. October 1993. "Private Dispute Resolution." A Working Paper for the National Symposium on Court-Connected Dispute Resolution Research, October 15-16, 1993, Orlando, Florida. Williamsburg, VA: National Center for State Courts.

Sander, Frank E.A. October 1995. "The Obsession with Settlement Rates." Negotiation Journal, Vol. 11, No. 4.

Schanck, Peter C. Winter 1990. "Taking up Barkan's Challenge: Looking at the Judicial Process and Legal Research." Law Library Journal, Vol. 82, pp. 1-.

Singer, Linda R. 1990. Settling Disputes: Conflict Resolution in Business, Families, and the Legal System. Boulder, CO: Westview Press, Inc.

Spain, Larry R. 1994. "Alternative Dispute Resolution for the Poor: Is it an Alternative?" North Dakota Law Review, Vol. 70, pp. 269-.

Stienstra, Donna and Thomas E. Willging. 1995. Alternatives to Litigation: Do They Have a Place in the Federal District Courts? Federal Judicial Center: Washington, DC.

Terrell, Timothy P. Spring 1987. "Emory University Sesquicentennial Colloquium: Rights and

Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution." Emory Law Journal, Vol. 36, pp. 541-.

USAID. 1995. "Background Paper on Alternative Dispute Resolution Mechanisms." USAID/Manilla, PRM Office. USAID: Manilla, Philippines.

_____. August 29, 1991. "Cooperative Agreement between the Agency for International Development with the Corporacion de Promocion Universitaria (CPU)." Project Number 5980642. USAID: Washington, DC. PDFCT048. (AVAILABLE ONLY TO AUTHORIZED USAID PERSONNEL)

_____. November 1987. "Evaluation Report: A.I.D. Human Rights Programs in the Asia Near East Bureau of the Agency for International Development." Project Numbers 3980280 and 3890251. Development Associates Report. USAID: Washington, DC. PDCBA565.

_____. September 30, 1992. "Grant Agreement between the Republic of Bolivia and the Government of the United States of America for the Bolivia Administration of Justice Project." Project Number 5110626. USAID: Washington, DC. PDABI526.

_____. April 26, 1994. "Memorandum: Project Assistance Completion Report for USAID/Bolivia's Justice Sector Project." Project Number 5110609. USAID: Washington, DC. PDABI330.

_____. [1993]. "Needs Assessment for Alternative Dispute Resolution in the Philippines." Project Number 4920470. USAID: Manila, Philippines. PNABX322.

_____. September 1994. "Privatization Support Project (611-0230): Not Quite Ninja Turtles, But Working on It." Incoming Telegram, Decontrolled, from American Embassy Lusaka, Zambia. USAID: Washington, DC. LOU/94/LUSAKA/5259.

_____. September 1988. "Project Authorization: Costa Rican Justice Sector Improvement Project." Project Number 5150244. USAID: Washington, DC. PDAAZ860.

_____. August 1991. "Project Paper: Colombia Justice Sector Reform." AID/LAC/P-669. Project No. 5149002. USAID: Washington, DC. PDABD423.

_____. August 1993. "Project Paper: Guatemala Trade and Labor Relations Development Program." AID/LAC/828. Project Number 5200403. USAID: Washington, DC. PDABG702.

_____. July 1992. "Project Paper: Nepal Democracy Project." Project Number 3670163. USAID: Washington, DC. PDABE875.

_____. May 1994. "Project Paper: Sri Lanka Citizens' Participation Project." Project Number 3830119. USAID: Washington, DC. PDABI560.

Weisan, Shi. December 1989. "Arbitration and Conciliation: Resolving Commercial Disputes in China." Loyola of Los Angeles International and Comparative Law Journal, Vol. 12, pp. 1-.

Wells, John Calhoun and Wilma B. Liebman. April 1996. "New Models of Negotiation, Dispute Resolution, and Joint Problem Solving." Negotiation Journal, Vol. 12, No. 2.

Wildau, Susan T., Christopher W. Moore and Bernard S. Mayer. Spring 1993. "Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad." Mediation Quarterly, Vol. 10, No. 3. *This article should be mandatory reading for USAID consultants engaged in ADR project activities.*

Whitson, Sarah Leah. 1992. "'Neither Fish, Nor Flesh, Nor Good Red Herring' *Lok Adalats*: An Experiment in Informal Dispute Resolution in India." Hastings International and Comparative Law Review, Vol. 15, pp. 391-.

Other Documents

Allor, David J. April 1993. "Alternative Forums for Citizen Participation: Formal Mediation of Urban Land Use Disputes." The International Journal of Conflict Management, Vol. 4, No. 2.

Alschuler, Albert W. June 1986. "Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases." Harvard Law Review, Vol. 99, pp. 1808-.

Arkin, Harry L. September 1993. "Pre-Arbitration Dispute Resolution: What is it, Where is it, and Why?" International Business Lawyer, Vol. 21, No. 8.

Atanda, Edward. 1990. "The Nigerian Arbitration and Conciliation Decree of 1988." The American Review of International Arbitration, Vol. 1, No. 3.

Augenblick, Mark and Delissa A. Ridgway. March 1993. "Dispute Resolution in World Financial Institutions." Journal of International Arbitration, Vol. 10, No. 1.

Aucoin, Lois. December 1994. "Dispute Resolution as an Alternative to the Ordinary Courts in Madagascar: A Guide to Choice in the International Arena." Country Report No. 15. Project Number 9400015. Center for Institutional Reform and the Informal Sector, University of Maryland: College Park, MD. PNABT589.

Bercovitch, Jacob. January 1991. "International Mediation and Dispute Settlement: Evaluating the Conditions for Successful Mediation." Negotiation Journal, Vol. 7, No. 1.

Bilsky, Wolfgang. 1990. "Extrajudicial Mediation and Arbitration: Evaluation of German Victim-Offender-Reconciliation Programs." The International Journal of Conflict Management, Vol. 1, No. 4.

Druckman, Daniel and Richard Harris. June 1990. "Alternative Models of Responsiveness in International Negotiation." Journal of Conflict Resolution, Vol. 34, No.2.

Edles, Gary J. 1987. "Proceeding: The ICC Hearing Process: A Cost-Benefit Approach to Administrative Agency Alternative Dispute Resolution." Transportation Law Journal, Vol. 16, pp. 99-.

Fletcher III, C. Edward. Winter 1988. "Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World." Emory Law Journal, Vol. 37, pp. 99-.

Gilkey, Roderick. Spring 1987. "Emory University Sesquicentennial Colloquium: Alternative Dispute Resolution: Hazardous or Helpful?" Emory Law Journal, Vol. 36, pp. 575-.

Greenebaum, Edwin H. Summer 1993. "Lawyers' Agenda for Understanding Alternative Dispute Resolution." Indiana Law Journal, Vol. 68, pp. 771-.

Herrnstein, Becky Hoover. Spring 1996. "Women and Mediation: A Chance to Speak and to be Heard." Mediation Quarterly, Vol. 13, No. 3.

Horlick, Gary N. and F. Amanda DeBusk. March 1993. "Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID." Journal of International Arbitration, Vol. 10, No. 1.

InterAmerican Development Bank. 1993. "Colombia: Programa de Fortalecimiento de Metodos Alternos de Solucion de Controversias Comerciales." Memorandum de Donantes (TC-93-08-11-6). Interamerican Development Bank: Washington, DC. (NOT FOR PUBLIC USE).

_____. 1994. "Peru: Cooperacion Technica no Reembolsable para un Programa para Desarrollar Sistemas Alternativos para la Resolucion de Conflictos, Fondo Multilateral de Inversiones (FOMIN)." Memorandum de Proyecto para los Donantes (TC-94-05-11-00). Interamerican Development Bank: Washington, DC. (NOT FOR PUBLIC USE).

Kanowitz, Leo. January 1987. "Alternative Dispute Resolution and the Public Interest: The Arbitration Experience." Hastings Law Journal, Vol. 38, pp. 239-.

Keilitz, Susan, editor. 1994. National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings—Implications for Courts and Future Research Needs. Williamsburg, VA: National Center for State Courts. *This document is a good resource for detailed information on U.S. court-annexed ADR, and lists summaries of various research studies, and their findings. It is, however, so centered on the U.S. that it was deemed not very relevant to this paper.*

Kirby, M.D. December 1992. "Report on the Fact-Finding and Conciliation Commission on Freedom of Association in South Africa, 1992." The Australian Law Journal, Vol. 66, No. 12.

Laufer, David. December 1989. "Mediation, Conciliation and Arbitration in China: Introduction." Loyola of Los Angeles International and Comparative Law Journal, Vol. 12, pp. 1-.

Lechman, Barbara Nagle and Louis A. Chiafullo. Winter 1995. "Book Review: New Jersey Dispute Resolution: A Lawyers Guide to State and Federal Court Programs, by Paul L. Tractenberg." Rutgers Law Review, Vol. 47, pp. 965-.

National Institute for Dispute Resolution. Winter 1993. "Special Issue: International Perspectives on Dispute Resolution." Forum (NIDR).

Paulsson, Jan. March 1992. "Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena." Journal of International Arbitration, Vol. 9, No. 1.

Posner, Richard A. Spring 1986. "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations." University of Chicago Law Review, Vol. 53, pp. 366-.

Ragan, Charles R. 1993. "Emerging Dispute Resolution Techniques in the Pacific Basin." Arbitration International, Vol. 9, No. 2.

Reif, Linda C. 1990-1991. "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes." Fordham International Law Journal, Vol. 14, pp. 3-.

de Senarclens, Pierre. February 1991. "The 'Realist' Paradigm and International Conflicts." International Social Science Journal, Vol. 43, No. 1.

Stukenborg, Charlene. Spring 1994. "The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts." Dayton Law Review, Vol. 19, pp. 1305-.

Swiercz, Paul M. and Linda P. Flynn. January 1993. "A Contingency Model of Mandated Mediation: Lessons from the Railway Labor Act." The International Journal of Conflict Management, Vol. 4, No. 1.

Tompkins Arthur. July 1993. "Cross-border Dispute Resolution in International Commercial Transactions." The New Zealand Law Journal, pp. 256-.

Trevino, Julio C. 1993. "Litigation, Arbitration, and Alternative Dispute Resolution." Loyola of Los Angeles International and Comparative Law Journal, Vol. 15, No. 909, pp. 986-.

Trubeck, David M., Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer, and Joel B. Grossman. October 1993. "The Cost of Ordinary Litigation." UCLA Law Review, Vol. 31, pp. 72-.

Walker, Jenonne. Spring 1993. "International Mediation of Ethnic Conflicts." Survival, Vol. 35, No. 1.

Wolf, Michael Allan. December 1983. "Book Review: Of Devils and Angels, Lawyers and Communities, Justice without Law? By Jerold S. Auerbach." Harvard Law Review, Vol. 97, pp. 607-.